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June 11 31  
**REPORTS**

OF

**CASES AT LAW AND IN CHANCERY**

ARGUED AND DETERMINED IN THE

**SUPREME COURT OF ILLINOIS.**

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**VOLUME 207.**

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN FEBRUARY,  
1904, AND CASES IN WHICH REHEARINGS WERE DE-  
NIED AT THE FEBRUARY TERM, 1904.

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**ISAAC NEWTON PHILLIPS,**  
**REPORTER.**

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**SPRINGFIELD:**  
**1904.**

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# JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

JOHN P. HAND, CHIEF JUSTICE.

BENJAMIN D. MAGRUDER,	}	JUSTICES.
JACOB W. WILKIN,		
JAMES H. CARTWRIGHT,		
CARROLL C. BOGGS,		
JAMES B. RICKS,		
GUY C. SCOTT,		

ATTORNEY GENERAL,  
H. J. HAMLIN.

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REPORTER,  
ISAAC NEWTON PHILLIPS.

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CLERK,  
CHRISTOPHER MAMER.



# TABLE OF CASES

REPORTED IN THIS VOLUME.

A		PAGE.			PAGE.
Alton, City of, v. Foster....	150		Chicago & Northwestern Ry.		
Antioch, Town of, <i>ads.</i> Seid-			Co. <i>ads.</i> Schumacher.....	199	
schlag .....	280		Chicago Union Traction Co.		
			v. City of Chicago.....	607, 544	
B			Cincinnati, Indianapolis &		
Baumgartner v. Bradt.....	345		Western Ry. Co. v. People.	566	
Big Four Drainage District			Cleary v. Hoobler.....	97	
<i>ads.</i> Highway Comrs.....	17		Coal Belt Electric Ry. Co. v.		
Biggerstaff v. VanPelt.....	611		Kays.....	632	
Board of Review of Mont-			Cobb Chocolate Co. v. Knud-		
gomery County <i>ads.</i> Cooper	472		son.....	452	
Bontjes <i>ads.</i> Deaconess Home			Cohen <i>ads.</i> Herschbach .....	517	
and Hospital.....	553		Comrs. of Highways of Town		
Bowyer v. People <i>ex rel.</i> .....	55		of Dix v. Drainage District.	17	
Bradt <i>ads.</i> Baumgartner ...	345		Consolidated Coal Co. v.		
Burkhalter <i>ads.</i> Cramer ....	34		Fleischbein.....	593	
			Continental Ins. Co. <i>ads.</i>		
C			Yates..	512	
Carlin <i>ads.</i> Glos.....	192		Cooper v. Board of Review		
Carroll <i>ads.</i> Rabbermann...	253		of Montgomery County...	472	
Cash <i>ads.</i> Jeffris.....	405		Cramer v. Burkhalter .....	34	
Cessna <i>ads.</i> Glos.....	69		Creech <i>ads.</i> Chicago City Ry.		
Champion v. Myers.....	308		Co .....	400	
Chicago, City of, <i>ads.</i> Chicago			D		
Union Traction Co....	607, 544		Darlington <i>ads.</i> Springer...	238	
Chicago, City of, for use, v.			Deaconess Home and Hos-		
City of Chicago.....	37		pital v. Bontjes.....	553	
Chicago, City of, <i>ads.</i> Gage.	56		Dick v. Zimmerman.....	636	
Chicago, City of, <i>ads.</i> Stone.	492		Dignan <i>ads.</i> Strong.....	385	
Chicago City Railway Co. v.			Dilcher v. Schorik .....	528	
Creech.....	400		Divan <i>ads.</i> Firebaugh.....	287	
Chicago City Railway Co. v.			Doyle v. People <i>ex rel.</i> .....	75	
O'Donnell.....	478		Driscoll <i>ads.</i> Chicago & East-		
Chicago & Eastern Illinois			ern Illinois R. R. Co.....	9	
R. R. Co. v. Driscoll.....	9		Dumont <i>ads.</i> Harris.....	583	
Chicago, Madison & North-			DuQuoin Water-Works Co.		
ern R.R. Co. v. People <i>ex rel.</i>	312		v. Parks.....	46	

E	PAGE.	PAGE.
Eiffert <i>ads.</i> Torsell.....	621	Hoobler <i>ads.</i> Cleary..... 97
Ellis v. Seipp Brewing Co....	291	Humphrey <i>ads.</i> Traders' Mutual Life Ins. Co..... 540
Ernst v. Schmitz.....	604	
F		I
Fergus <i>ads.</i> Harris .....	534	Illinois Central R. R. Co. v.
Firebaugh v. Divan.....	287	Hatter..... 88
First Nat. Bank of Metropolis v. Leech.....	215	Irwin v. Northwestern Nat. Life Ins. Co..... 531
Flanedy <i>ads.</i> Glos.....	230	
Fleischbein <i>ads.</i> Consolidated Coal Co.....	593	J
Florville <i>ads.</i> People <i>ex rel.</i> ..	79	Jeffris v. Cash..... 405
Fortune v. Gilbert.....	235	
Foster <i>ads.</i> City of Alton...	150	K
Frier v. Lowe.....	410	Kau <i>ads.</i> Pfaelzer .....
		Kays <i>ads.</i> Coal Belt Electric Ry. Co .....
G		Kellyville Coal Co. v. Harrier. 624
Gage v. City of Chicago....	58	Kingman & Co. <i>ads.</i> Glos ... 26
Gage v. People <i>ex rel.</i> ..377, 73,	61	Kloss v. Wylezalek..... 328
Gallagher v. People .....	247	Knudson <i>ads.</i> Cobb Chocolate Co..... 452
Gersbacher <i>ads.</i> Mayer....	296	Kuhn <i>ads.</i> Security Ins. Co.. 166
Gilbert <i>ads.</i> Fortune.....	235	
Gillett v. Gillett.....	136	L
Glenn <i>ads.</i> People <i>ex rel.</i> ....	50	Lamb <i>ads.</i> Gray..... 258
Glos v. Carlin.....	192	Leech <i>ads.</i> First Nat. Bank of Metropolis..... 215
Glos v. Cessna.....	69	Lowe <i>ads.</i> Frier..... 410
Glos v. Flanedy.....	230	
Glos v. Kingman & Co.....	26	M
Gould v. Magnolia Metal Co.	172	Magnolia Metal Co. <i>ads.</i>
Gray v. Lamb.....	258	Gould. .... 172
H		Mayer v. Gersbacher..... 296
Handlon <i>ads.</i> Wilenou .....	104	Mead <i>ads.</i> City of Rockford. 423
Harrier <i>ads.</i> Kellyville Coal Co .....	624	Miller <i>ads.</i> Seiberling..... 443
Harris v. Dumont.....	583	Moir <i>ads.</i> People..... 180
Harris v. Fergus.....	534	Murphy v. Murphy..... 250
Harrison v. National Bank of Monmouth.....	630	Murphy v. People <i>ex rel.</i> .... 337
Hatter <i>ads.</i> Illinois Central R. R. Co .....	88	Myers <i>ads.</i> Champion..... 308
Hawthorn v. Ulrich.....	430	Myers <i>ads.</i> Smith..... 126
Herath <i>ads.</i> Pressed Steel Car Co.....	576	N
Herschbach v. Cohen.....	517	National Bank of Monmouth <i>ads.</i> Harrison..... 630
Hogue v. Steel.....	340	Northwestern Nat. Life Ins. Co. <i>ads.</i> Irwin..... 531

O	PAGE.	S	PAGE.
O'Donnell <i>ads.</i> Chicago City Ry. Co.....	478	Schmitz <i>ads.</i> Ernst.....	604
O'Donnell <i>v.</i> People.....	247	Schorik <i>ads.</i> Dilcher.....	528
Opel <i>ads.</i> People <i>ex rel.</i> .....	469	Schumacher <i>v.</i> Chicago & Northwestern Ry. Co.....	199
		Security Ins. Co. <i>v.</i> Kuhn...	166
		Selberling <i>v.</i> Miller.....	443
		Seidschlag <i>v.</i> Town of Antioch.....	280
P		Seipp Brewing Co. <i>ads.</i> Ellis.	291
Parks <i>ads.</i> DuQuoin Water Works Co..	46	Shea <i>v.</i> Teufert.....	222
Payne <i>v.</i> White.....	562	Shepherd <i>ads.</i> Riverton Coal Co.....	395
People <i>ex rel.</i> <i>ads.</i> Bowyer...	55	Smith <i>v.</i> Myers .....	126
People <i>ex rel.</i> <i>ads.</i> Chicago, Madison & North. R. R. Co.	312	Smith <i>ads.</i> Pittsburg, Cin., Chicago & St. L. Ry. Co...	486
People <i>ex rel.</i> <i>ads.</i> Cincinnati, Ind. & Western Ry. Co....	566	Spring Valley Coal Co. <i>v.</i> Robizas.....	226
People <i>ex rel.</i> <i>ads.</i> Doyle.....	75	Springer <i>v.</i> Darlington.....	238
People <i>ex rel.</i> <i>v.</i> Florville....	79	Steel <i>ads.</i> Hogue.....	340
People <i>ads.</i> Gallagher .....	247	Stone <i>v.</i> City of Chicago....	492
People <i>ex rel.</i> <i>v.</i> Glenn .....	50	Strong <i>v.</i> Dignan,.....	385
People <i>v.</i> Moir ..	180		
People <i>ex rel.</i> <i>ads.</i> Murphy...	337	T	
People <i>ads.</i> O'Donnell.....	247	Teufert <i>ads.</i> Shea .....	222
People <i>ex rel.</i> <i>v.</i> Opel .....	469	Thompson <i>v.</i> People <i>ex rel.</i> ...	334
People <i>ex rel.</i> <i>ads.</i> Pike. ...	36	Torsell <i>v.</i> Eiffert.....	621
People <i>ex rel.</i> <i>v.</i> Rose .....	352	Traders' Mutual Life Ins. Co. <i>v.</i> Humphrey.....	540
People <i>ex rel.</i> <i>ads.</i> Ryan.....	74		
People <i>ex rel.</i> <i>ads.</i> Thompson.	334	U	
People <i>ex rel.</i> <i>ads.</i> Yates....	316	Ulrich <i>ads.</i> Hawthorn.....	430
Pfaelzer <i>v.</i> Kau. ....	116		
Pike <i>v.</i> People <i>ex rel.</i> .....	36	V	
Pittsburg, Cin., Chicago & St. L. Ry. Co. <i>v.</i> Smith....	486	VanPelt <i>ads.</i> Biggerstaff....	611
Pressed Steel Car Co. <i>v.</i> Herath.....	576		
		W	
R		White <i>ads.</i> Payne.....	562
Rabbermann <i>v.</i> Carroll.....	253	Wilenou <i>v.</i> Handlon .....	104
Riverton Coal Co. <i>v.</i> Shepherd.....	395	Wormley <i>v.</i> Wormley. ....	411
Robizas <i>ads.</i> Spring Valley Coal Co.....	226	Wylezalek <i>ads.</i> Kloss .....	328
Rockford, City of, <i>v.</i> Mead..	423		
Rose <i>ads.</i> People <i>ex rel.</i> .....	352	Y	
Rudolph <i>v.</i> Rudolph.....	266	Yates <i>v.</i> Continental Ins. Co.	512
Ryan <i>v.</i> People <i>ex rel.</i> .....	74	Yates <i>v.</i> People <i>ex rel.</i> .....	316
		Z	
		Zimmerman <i>ads.</i> Dick .....	636



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF ILLINOIS.

---

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

v.

CLARA C. DRISCOLL, Admx.

207 9  
112a 1572

*Opinion filed December 16, 1903—Rehearing denied February 5, 1904.*

1. MASTER AND SERVANT—*whether a particular act is performed as vice-principal or fellow-servant is for the jury.* Whether an assistant yard-master of the defendant was acting as vice-principal or as a fellow-servant of members of a switching crew in giving a signal to the crew to move a train of cars is a question of fact for jury.

2. SAME—*what does not relieve defendant from liability for act of vice-principal.* If defendant's assistant yard-master acts as vice-principal in giving a signal to a switching crew to start a train, the fact that he gave the signal in the same manner that it would be given by a member of the switching crew does not relieve the defendant from liability for an injury caused thereby.

3. SAME—*when the question of negligence is properly left to the jury.* Whether defendant's assistant yard-master was negligent in not ascertaining whether the rear car on a spur track was on the rails before giving the switch crew a signal to pull up is properly left to the jury, where there is evidence tending to show that the car had been off the track for forty minutes but that he gave the signal before the switch crew had time to make any investigation.

4. DAMAGES—*re-marriage of plaintiff cannot be considered in mitigation of damages.* The re-marriage of plaintiff in an action for

damages for the alleged negligent killing of her husband cannot be considered by the jury in mitigation of damages.

5. EVIDENCE—*what may be shown in an action for negligence.* In an action based upon the alleged negligence of defendant's assistant foreman in signaling a switch crew to pull a string of cars from a spur track before he knew whether or not the rear car was on the rails, it is proper to show he frequently looked the cars over and reported their condition to the switch crew, and that in such case the crew did not examine the cars before moving them.

WILKIN, J., dissenting.

*C. & E. I. R. R. Co. v. Driscoll*, 107 Ill. App. 615, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

W. H. LYFORD, (ALBERT M. CROSS, of counsel,) for appellant.

JAMES C. MCSHANE, for appellee.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

This is an appeal to review the action of the Appellate Court for the First District in affirming a judgment for \$5000, recovered in an action on the case brought by the appellee, as administratrix, against the appellant, in the circuit court of Cook county, for damages alleged to have been sustained by her by reason of the death of her husband. The case was before this court at a former term, (176 Ill. 330,) when a judgment in favor of plaintiff for a like amount was reversed and the cause remanded for a new trial.

It appears from the evidence that appellant had two switching crews engaged in handling cars in its yard in the city of Chicago. Each crew consisted of five men,—an engineer, a fireman, a foreman and two helpers. One crew was known as Ward's crew and the other as Hurd's

crew. The deceased was a helper with Ward's crew. The appellant had three stub-tracks in its yard, upon which cars were placed while being repaired, and were designated as tracks No. 1, No. 2 and No. 3. These stub-tracks had no butt-posts, but were left open, so that cars, when pushed too far thereon, would run off on to the ground. On the evening of the injury Hurd's crew went in on track No. 1 with their engine and pushed the cars, eleven in number, standing upon that track, together. The car at the end of the track was an empty flat-car and was left with the brake set, with the rear wheels about ten inches from the end of the rails. They then pushed the cars, six in number, upon track No. 2, together. They then went in on track No. 3, coupled together the cars on that track, seven in number, pulled up and backed in on track No. 2 and coupled to the cars on that track, and then pulled up and backed in on track No. 1 and coupled to the cars standing upon that track, the result of which was, they had a train of twenty-four cars. Without going to the rear of the train to see whether the wheels of the rear car were upon the track, the crew were ordered by Blake, the assistant night yard-master of appellant, to go to another part of the yard to do some switching, and Ward's crew, which was at work in the yards some distance from track No. 1, were ordered by him to take out the train left by Hurd's crew on track No. 1 and break it up. In going to that track Ward's engine was taken too far south. When Ward discovered this he sent the deceased to bring it back. Blake, who had gone to that part of the yard before the arrival of the deceased, stopped the engine, and he and Jordan, the other helper in Ward's crew, got on the north end of the engine, which was proceeding in the direction of track No. 1. On their way to that track they passed the deceased. Whether he got on the south end of the engine is not shown. When deceased started to bring back the engine, Ward started to look over the

train on track No. 1. When the engine arrived, it hitched on to the south end of the train. Ward was then about eight car-lengths from its south end. The train filled track No. 1 and extended on to track No. 19, with which tracks No. 1, No. 2 and No. 3 connected. Blake went to where Ward was standing and said to him the train was all right; to go ahead; and then gave the signal to the engineer to go ahead. The deceased was not seen by Blake or any of the crew, so far as the evidence shows, after the engine passed him, until the train started. It was customary for one helper to go ahead of the engine to open switches, give signals, etc., and for one to go in the rear to close switches, give signals, etc. A number of cars were standing on a track near where track No. 1 joined track No. 19. The rear truck on the car at the end of track No. 1 had run off the rails on to the ground. When the train was pulled forward, the truck ran on the ties until it came to track No. 19, when the car collided with the cars standing on the adjoining track, and the deceased, being between the standing and moving cars, was thrown down and run over and killed.

A right of recovery upon the first trial was predicated upon three grounds: First, the negligence of the appellant in failing to place a butt-post at the end of track No. 1; second, the negligence of the crew of Hurd in leaving the train with the rear truck of the last car upon track No. 1 off of the rails; and third, the negligence of Blake, the appellant's assistant yard-master, (who, it was averred, knew, or by the exercise of ordinary care might have known, the car was off the track, and knew, or ought to have known, that the deceased and his crew were ignorant thereof,) in ordering the crew of which deceased was a member, to attach the engine to and move the train without notifying them of the position of the car on track No. 1, which was off of the rails, or giving them time to make an examination of the train with the view to obtain that information for themselves.

In the former opinion of this court it was held that the failure to have a butt-post at the end of track No. 1 was not negligence on the part of appellant, and that the members of the Hurd and Ward crews were fellow-servants as a matter of law, and that there could be no recovery by reason of the negligence of the Hurd crew. It was also held there could be no recovery by reason of the negligence of Blake, as assistant night yard-master, unless the evidence showed, which it did not, that he had actual notice that the car was off the track, or that said car had been off the track for so long a time that in the exercise of ordinary care he was bound to know such car was off the track at the time he ordered the train to be moved. On the last trial the first two grounds of recovery were abandoned and the appellee relied solely for a recovery upon the negligence of Blake, and endeavored to supply the proof which the court had held was wanting on the first trial. No claim is made that Blake had actual notice that the car was off the track when he ordered the train to be pulled out. The question, therefore, arising for our determination upon this record is, does the proof, with all the inferences that may legitimately be drawn therefrom, fairly tend to show that the car had been off the track for so long a time before Blake gave the order to move the train, that he, in the exercise of ordinary diligence, ought to have known that the car was off the track?

On the first trial it did not appear which crew pushed the car off the track, or how long it had been off before the order was given by Blake to move the train. The evidence in the last trial shows that when the eleven cars on track No. 1 were pushed together by Hurd's crew the brake was set and the wheels of the last car were left within ten inches of the ends of the rails; that afterwards a train of thirteen cars was pushed in on track No. 1 against the cars standing on that track, and that while the coupling was carefully made the cars were moved

somewhat. One witness states they were moved six or eight inches at the point of coupling, and that there was more or less slack between the cars. No other engine came in contact with said train until Ward's crew took hold of it with their engine, with the view of pulling it out and breaking it up. The car was therefore pushed off the rails either by the engine of the Hurd or the engine of the Ward crew. The evidence tends to show when Ward's engine was attached the train was not moved. When Hurd's engine went in on track No. 1 it had hold of thirteen cars. When the Ward engine took hold of the train no cars were attached to it. An examination of the ground after the accident occurred showed the wheels of the last car on track No. 1 were off the rails, on the ground, several feet. This could be accounted for, in part, by reason of the fact that the ends of the rails were several inches higher than the ground. In view of this evidence, which engine pushed the car off the track was a question of fact to be determined by the jury. If it be conceded that the engine of the Hurd crew pushed the car off, then the evidence fairly tends to show that it was off the track at least forty minutes before the order was given by Blake to pull out the train, which the jury might reasonably have found, from the evidence, was ample time within which Blake should have learned the fact that the car was off the track, and that if he did not ascertain that fact within that time, but ordered the train moved without knowing the condition of the train, he would, as to the deceased, be deemed to know its condition and that the rear car was off the track. We think that the court properly submitted to the jury the question whether Blake ought to have known the car was off the track at the time he gave the order to pull out the train, and that the court did not err in declining to peremptorily instruct the jury to find in favor of the defendant. Furthermore, while the evidence shows it was the duty of Ward's crew, according to their ordinary

course of doing their work, to have examined the train to see that it was in proper condition to be moved before starting to pull it out, the evidence tended to show they did not have time to make such examination before Blake gave the signal to the engineer to go forward. At that time Ward or Jordan had not examined the train, and the evidence tends to show that while the deceased was on the way to the rear of the train, he had not, at the time the order was given by Blake, reached the rear of the train, but was seen by Blake at about the time the train started, in the vicinity of the junction of track No. 1 and track No. 19, which was the point at which he was killed within a few seconds thereafter. It would be a harsh rule of law that would permit no recovery because the deceased did not examine the rear car to ascertain whether it was in shape to be moved, unless he was given an opportunity to make the examination. It was also shown that Blake frequently, when the work was pressing, examined the trains and informed the crews if they were in shape to be moved, in which case they were moved without further examination. In this case Blake said to Ward the cars were in shape to go forward, and gave the signal to the engineer to pull them out.

It is urged, however, there can be no recovery because Blake, in giving the order to move the train, was not performing the act of a vice-principal, but the act of a fellow-servant of the deceased. The question whether Blake at that time was a vice-principal or a fellow-servant was a question of fact for the jury, (*Goldie v. Werner*, 151 Ill. 551,) and although he was acting in a dual character, the question whether the particular act of signaling the engine to start was the act of a vice-principal or the act of a fellow-servant of the deceased was also a question of fact for the jury, (*Mobile and Ohio Railroad Co. v. Massey*, 152 Ill. 144,) and if the train was started by Blake by reason of the authority which he exercised as vice-principal, the fact that he gave the signal to start

in the same manner that similar signals were given by the members of the switching crews would not relieve appellant from liability. *Graver Tank Works v. O'Donnell*, 191 Ill. 236. See, also, *Norton Bros. v. Nadebok*, 190 Ill. 595.

The court instructed the jury that they should not take into consideration, in mitigation of damages, the fact that plaintiff had re-married subsequently to the death of her intestate. We are of the opinion the court did not err in so instructing the jury. (*Chicago, Peoria and St. Louis Railroad Co. v. Woolridge*, 174 Ill. 330.) In volume 8 of the American and English Encyclopedia of Law, (2d ed.) on page 937 it is said: "In an action by a husband to recover for the wrongful killing of his wife, in which one of the principal elements of damage is the loss to him of his wife's services, the defendant cannot show, in reduction of damages, that the plaintiff has married a second wife, who performs for him all the services rendered by his deceased wife." And in *Philpott v. Pennsylvania Railroad Co.* 175 Pa. St. 570, the same rule was held to apply where the suit was by a wife who had married since the death of her husband, for whose wrongful death the suit was brought.

We find no reversible error in the other instructions given on behalf of the appellee. Nor do we think it was error to permit the appellee to prove that Blake often looked the cars over and reported their condition to the crew before they were moved, and that under such circumstances the crew did not examine the cars before moving them.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE WILKIN, dissenting.

COMMISSIONERS OF HIGHWAYS OF TOWN OF DIX *et al.*  
v.

THE BIG FOUR DRAINAGE DISTRICT OF FORD COUNTY.

*Opinion filed December 16, 1903—Rehearing denied February 5, 1904.*

1. APPEALS AND ERRORS—*when case relates to the revenue.* A *mandamus* proceeding by a drainage district to compel the levy and collection of a tax to pay a drainage assessment confirmed against a town relates to the revenue, and an appeal lies to the Supreme Court from the circuit court.

2. DRAINAGE—*objections to drainage assessment which could have been made before confirmation, are waived.* In a proceeding to collect a drainage assessment confirmed under the Levee act, no objection can be considered which might have been urged at the time the assessment roll was confirmed.

3. SAME—*when objections to court's jurisdiction will not be considered.* Objections to the jurisdiction of the county court to confirm a drainage assessment, levied under the Levee act, will not be considered in a proceeding to collect the assessment unless such objections are sustained by the record of that court.

4. SAME—*when drainage commissioners may bring mandamus to compel tax levy.* A drainage district organized under the Levee act may bring *mandamus* to compel the levy of a tax to pay a drainage assessment confirmed against a town without recovering a judgment at law, since the confirmation judgment fixes the amount due. (*Comrs. of Highways v. Drainage Comrs.* 127 Ill. 581, and *County of McLean v. City of Bloomington*, 106 id. 209, distinguished and explained.)

5. SAME—*statute provides for levy of specific tax to pay drainage assessment against a town.* Section 55 of the Levee act and section 15 of the Road and Bridge act have provided for the levy of a specific tax to pay a drainage assessment confirmed against a town under the Levee act.

6. PLEADING—*when facts showing jurisdiction of the court need not be averred.* In pleading a judgment of the county court confirming a drainage assessment, it is unnecessary to aver the facts which gave the court jurisdiction of the parties and the subject matter.

7. COSTS—*when costs in mandamus are properly adjudged against the defendants.* In awarding *mandamus* to compel the taxing authorities of a town to levy a tax to pay the drainage assessment confirmed against the town under the Levee act it is proper to adjudge costs against defendants, where demand of levy was made before suit brought.

APPEAL from the Circuit Court of Ford county; the  
Hon. JOHN H. MOFFETT, Judge, presiding.

TIPTON & TIPTON, for appellants.

CLOUD & MOFFETT, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Appellee filed a petition on September 6, 1902, for a writ of *mandamus*, in the circuit court of Ford county, against the town of Dix, the commissioners of highways, the board of town auditors and the town clerk of the town of Dix, in that county, commanding the commissioners to levy a tax to pay an assessment of \$3250 made by the appellee and confirmed by the county court, against the town of Dix, for the purpose of establishing a system of drainage in the Big Four drainage district, commanding the board of auditors to consent thereto, in writing, if the amount of the total levy was so great as to require their written consent under the Road and Bridge act, and commanding the clerk to certify the levy, when made, to the county clerk. The petition was amended, and to it, as amended, a demurrer was interposed, which was overruled. Thereupon defendants answered, presenting eleven issues or denials. To certain of these denials a demurrer was sustained and overruled as to the remainder, and to this remainder replications were filed. A general demurrer was interposed to the replications, which was overruled by the court, whereupon issues were joined on the replications, and at the April term, 1903, the circuit court of Ford county, after a trial without the intervention of a jury, entered a judgment in accordance with the prayer of the petition. The town of Dix and the commissioners of highways bring the case to this court by appeal.

As the suit was brought by the drainage district for the purpose of collecting an assessment made by it against the town of Dix, the case relates to the revenue, under the authority of *Kilgour v. Drainage Comrs.* 111 Ill. 342, and comes directly to this court from the circuit court.

The Big Four drainage district of Ford county, Illinois, was organized in August, 1899, under the statute commonly called the Levee act. (Hurd's Stat. 1901, p. 689.) Commissioners were appointed, and they initiated a plan for a system of drainage, the main ditch of which was to run through the town of Dix, in that county. The commissioners, in making their estimate for the purpose of raising funds with which to construct the necessary drainage of the district, entered into negotiations with the commissioners of highways of the town of Dix, and as a result thereof a contract in writing was entered into at Elliott, in that county, in accordance with the provisions of section 55 of the Levee act, some time in the month of October, 1899, and, as shown by the preponderance of the evidence, at a regular meeting of the highway commissioners on October 28, 1899. By this contract it was agreed that the town of Dix should be assessed in the sum of \$3250. This action of the highway commissioners was not made a matter of record by them, nor was the contract entered into, recorded upon their records. On February 14, 1900, the commissioners of the drainage district filed their assessment roll in the county court of Ford county, and upon that roll the assessment of the town of Dix appeared at the sum of \$3250. The contract referred to was filed in that court on the 9th day of May, 1900, and on that same day that court entered a judgment confirming the assessment roll, the assessment against the town of Dix so confirmed being for the sum of \$3250, and on the same day said court entered an order dividing this assessment into eight equal installments, one of which was payable on the first day of each of the years from 1902 to 1909, both inclusive, and each of said installments was made to draw interest at the rate of six per cent per annum from May 9, 1900, payable on January 1 of each year, the first installment of interest to be due and payable on January 1, 1901. The town of Dix has never paid anything on account of this

assessment. On September 2, 1902, appellee made a demand on the commissioners of highways and the board of town auditors of the town of Dix, requiring them to levy taxes for the payment of the first three installments of the assessment, with interest on the whole assessment to January 1, 1903. This demand was refused.

Appellants devote a considerable portion of their brief and argument to an attempt to demonstrate the invalidity of the contract of October 28, 1899, on the ground, first, that the commissioners of highways had no authority to bind the town; and second, that the contract is not binding upon the town because it cannot be made to appear by the record of the commissioners.

We do not consider the question of the validity of this contract material. The proceeding is to enforce the assessment. The amount of that assessment has been determined by the judgment of confirmation entered by the county court. Section 34½ of the Levee act provides:

"This act shall be liberally construed to promote the ditching, drainage, and reclamation of wet or overflowed lands; and collection of assessments shall not be defeated by reason of any omission, imperfection or defect in the organization of any district, or in any proceedings occurring prior to the judgment of the court, confirming the assessments of benefits and damages; but said judgment shall be conclusive that all prior proceedings were regular and according to law."

In proceedings under this act we have heretofore held that in a proceeding to collect the amount of the assessment, no objection to the assessment will be considered which could have been urged at the time of the confirmation of the assessment roll. Objections which could have been made then and which were not made then must be considered as waived. (*Riebling v. People*, 145 Ill. 120; *Hammond v. People*, 169 id. 545.) Objections which question the jurisdiction of the county court are excepted from the operation of this rule, but such objections being a collat-

eral attack upon the judgment of the county court will not be considered unless they appear from the record of that court. (*Dickey v. People*, 160 Ill. 633; *Young v. People*, 171 id. 299; *Casey v. People*, 165 id. 49.) The question of the validity of the contract fixing the amount of the assessment being one which could have been presented upon the application for the confirmation of the assessment will not be considered here. When the judgment of confirmation was introduced in evidence counsel for appellants said: "I am objecting to that as being immaterial and not in issue; the only issue of fact is what occurred down there at Elliott." This objection was overruled, and no other objection to the introduction of the judgment was made, consequently appellants could not now insist that the county court was without jurisdiction to enter the judgment of confirmation, even if there was anything in the record of that court to warrant such an objection.

It is argued that the remedy by *mandamus* is improper in advance of a judgment at law determining the amount due, and we are referred to *Commissioners of Highways v. Drainage Comrs.* 127 Ill. 581. The drainage district in that case was not organized under the Levee act, but under the Farm Drainage act. (Hurd's Stat. 1901, p. 712.) The procedure for the collection of money is quite different under that act. According to its provisions the lands are classified, and by this classification it is determined what proportion or percentage of the total tax to be raised each tract shall bear. This classification is confirmed by the county court. The drainage commissioners then certify to the county clerk the amount of taxes they desire levied. The clerk spreads this tax upon the lands in accordance with the classification. The land owner has no opportunity to object to the amount of the tax levied upon his land until application is made for a judgment and order of sale against his land for the delinquent drainage tax. When that application is made he has a right to make any defense that has arisen since

the confirmation of the classification, as that the levy is not made in accordance with the statute, or that it has not been distributed in accordance with the classification. The case last cited was an action of debt to recover a judgment at law for the amount of the drainage assessment, and in deciding the case the court said, incidentally, that before applying for *mandamus* there must be a judgment at law determining the amount due. It will be observed that the amount of that assessment had not been fixed by a judgment of confirmation or otherwise, except by the levy made by the drainage commissioners, and the town had the right to be heard as to the amount properly due. It was not concluded in regard to the amount by the action of the drainage commissioners in making the levy or of the clerk in extending the assessment.

*County of McLean v. City of Bloomington*, 106 Ill. 209, was an appeal from a judgment for a special assessment against the court house square of the county of McLean for the improvement of adjacent streets in the city of Bloomington. What was there said, as well as what was said in 127 Ill. in reference to the necessity of a judgment at law preceding *mandamus*, was wholly unnecessary to the disposition of the case then before the court; and, moreover, so far as the *McLean County case* is concerned, there was no statute specially providing the method by which a county should meet a special assessment against its property, and in that respect the *McLean County case* is distinguishable from the one at bar, as we shall hereafter see.

In *People v. Clark County*, 50 Ill. 213, this court decided that *mandamus* would not lie to compel the board of supervisors to levy a tax to pay an order drawn by that board upon the county treasurer which was payable out of the general revenue fund, and it was said that the order was no more than an acknowledgment that the sum specified is due from the county, and this court, in *People v. Getzendaner*, 137 Ill. 234, said in reference thereto,

(p. 261): "In such cases no single general creditor has a right to any previously ascertained specific part of the general revenue, and there is, moreover, judgment and discretion to be exercised by the municipal authority with respect to the purpose and amount of general revenue which they shall annually cause to be collected by taxation upon the taxable property of the municipality."

In the *Getzendaner case*, which was an original proceeding in this court, the town of Mount Morris, in Ogle county, had issued bonds to assist in the construction of the Chicago and Iowa railroad. They were delivered to the railroad company and by that company negotiated and sold. The purchaser of a part of the bonds filed a petition for *mandamus* in this court seeking to have the town officers commanded to levy a tax to pay the bonds. It was objected that inasmuch as the claim had never been reduced to judgment the proceeding by *mandamus* was improper. This court held that as it was provided by the act to incorporate the Chicago and Iowa Railroad Company that any town donating its bonds should, by its corporate authorities, "annually thereafter assess and levy a tax upon the taxable property of such town \* \* \* sufficient to pay and liquidate the annually accruing interest on such bonds, and so much of the principal thereof as from time to time shall become due, which taxes shall be levied and collected in the same manner as other corporate taxes in such town," there was presented a lawful debt against the town, the amount of which was fixed and certain, and it was the duty of the proper officers to assess and levy a tax upon the taxable property of the town for the payment of that particular debt, and upon their failure to do so, *mandamus* was a proper remedy. In the case at bar the amount of the debt is fixed by the judgment of confirmation. This is a proceeding to collect that debt. If it had been against a natural person or private corporation it would have been by application in the county court for a judgment and order

of sale against real estate. That course cannot be pursued here, as there is no property of the town which can be sold under such a judgment for the satisfaction of this assessment. To require appellee to first recover a judgment at law before resorting to *mandamus* would be to require a useless thing. If suit were brought at law, appellants could interpose no defense questioning the amount or validity of the assessment unless they could show by the record of the county court itself that that court had no jurisdiction to render the judgment, and they had that right in this proceeding, so that a suit at law would simply result in another judgment for the amount of the assessment which is already fixed absolutely by the judgment of confirmation, and the appellee would still be obliged, if the judgment at law were not paid, to resort to *mandamus* for its satisfaction. No good purpose could be served by requiring appellee to recover a judgment at law.

Section 55 of the Levee act provides, among other things: "In case such assessment is made against any township in this State, the commissioners of highways of such town shall cause the same to be levied and paid to said district in the manner provided by sections 13, 14, 15 and 16" of the Road and Bridge act. Section 15 of that act (Hurd's Stat. 1901, p. 1523,) requires the commissioners of highways, where damages "have been agreed upon, allowed or awarded \* \* \* for ditching to drain roads, the amounts of such damages, not to exceed for any one year, twenty cents on each \$100 of the taxable property of the town, shall be included in the first succeeding tax levy," and shall be in addition to the levy for road and bridge purposes. The succeeding section directs the commissioners to certify the general levy and the amount for the payment of such damages as separate items to the town clerk, and he is to certify the same items separately to the county clerk, who is directed to extend the two items as one tax. It is apparent that the

legislature intended the taxation provided by section 55 of the Levee act, for the payment of a drainage assessment, to be levied under section 15 of the Road and Bridge act, and has thus provided for the levy of a specific tax for the payment of assessments of this character against the town, and as the amount of the assessment is fixed by the judgment of confirmation, the right of appellee to the writ of *mandamus* is clear and certain under the law as stated by this court in *People v. Getzendaner*, *supra*.

What we have said disposes of the questions which arose on the pleadings, with one exception. When the demurrer to the amended petition was overruled appellants answered, but they insist that nevertheless the court should now find the petition insufficient, for the reason that it does not show that the county court had jurisdiction to render this judgment of confirmation. We deem it unnecessary in this case, after judgment, to discuss the averments of the petition for the purpose of determining whether or not they show that the county court had such jurisdiction. "County courts in this State are courts of general jurisdiction with respect to all matters coming within the purview of their jurisdiction as given by law." (*Matthews v. Hoff*, 113 Ill. 90; *Field v. Peoples*, 180 id. 376.) In pleading the judgment of such a court it is unnecessary to aver the facts which gave it jurisdiction of the parties and subject matter of the litigation. *Wallace v. Cox*, 71 Ill. 548; *People v. Lane*, 36 Ill. App. 649; 2 Greenleaf on Evidence, sec. 279, note; 11 Ency. of Pl. & Pr. p. 1130.

The assignment of errors questions the action of the court in entering a judgment against the defendants below for costs. As demand was made upon them prior to the beginning of the suit, calling upon them to levy a tax with a view to satisfying the assessment, and they refused, the judgment was proper.

The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

JACOB GLOS

v.

KINGMAN &amp; Co.

*Opinion filed December 16, 1903—Rehearing denied February 5, 1904.*

1. **CLOUD ON TITLE**—*prima facie* proof of title does not warrant decree removing cloud. *Prima facie* proof of title in the complainant in a bill to remove a cloud does not warrant a decree canceling a tax deed as a cloud, unless it is alleged and proved that such deed is invalid and constitutes a cloud upon complainant's title.

2. **REGISTRATION OF TITLE**—an applicant must show a title good as against the world. Evidence establishing title good as against the world is essential to warrant a decree awarding initial registration of title.

3. **SAME**—*effect of failure to prove title*. If an applicant for initial registration of the title in fee fails to establish such title in himself, he is not entitled either to registration of his own title or to a decree finding that the titles of the defendants are clouds upon such *prima facie* title as he may have shown, and the application should be dismissed.

4. **SAME**—*defendant may insist, on appeal, that evidence of complainant's title was insufficient*. On appeal from a decree finding title in fee to be in the applicant for initial registration and finding defendant's tax deed to be a cloud, the defendant may insist that the evidence of such title was insufficient to warrant the decree.

5. **SAME**—*when title in fee is not established*. Title in fee in an applicant for initial registration is not shown by proof of deeds and tax receipts unconnected with any chain of title from the government, and which fall short of establishing a title under the Statute of Limitations.

APPEAL from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

JACOB GLOS, and JOHN R. O'CONNOR, for appellant:

An applicant for initial registration must establish, by proof, a fee simple title. *Railway Co. v. Keegan*, 185 Ill. 70; *People v. Simon*, 176 id. 176; *Torrens Law*, secs. 40, 41; *Lomax v. Pickering*, 165 Ill. 431; *Doty v. Burdick*, 83 id. 473; *Loewenthal v. Elkins*, 175 id. 553.

The burden of proving the invalidity of a tax deed as a cloud on title rests upon complainant. *Hyde v. Heath*,

75 Ill. 381; *Gage v. Reid*, 104 id. 509; *Gage v. Curtis*, 122 id. 520; *Gage v. Stokes*, 125 id. 40; *Gage v. Caraher*, 125 id. 448; *Gage v. McLaughlin*, 101 id. 155; *Bank v. Baker*, 161 id. 281.

A proceeding to register title under the act concerning land titles, approved and in force May 1, 1897, is a proceeding in chancery. *Gage v. Electric Light Co.* 194 Ill. 34.

VICTOR M. HARDING, for appellee:

Possession of land claiming an ownership in fee is *prima facie* evidence of ownership and seizin of the inheritance. 26 Am. & Eng. Ency. of Law, 22; *Barger v. Hobbs*, 67 Ill. 592; *Harland v. Eastman*, 119 id. 22.

Possession of land under claim of ownership establishes a *prima facie* title in the party. *Glos v. Gerrity*, 190 Ill. 545; *Gage v. Schmidt*, 104 id. 106; *Glos v. Randolph*, 138 id. 268; *Gosselin v. Smith*, 154 id. 74; 17 Ency. of Pl. & Pr. 301.

Where, in suits involving title to land, the only adverse claim is under a tax deed, and no proof of right thereunder is made, *prima facie* proof of title is sufficient. *Glos v. Gerrity*, 190 Ill. 545; *Hintraeger v. Kiene*, 62 Iowa, 605; *Glos v. Randolph*, 138 Ill. 268.

A deed to complainant, and proof of possession thereunder, in the absence of countervailing proof, is sufficient proof of complainant's title in suits involving title to land. *Glos v. Gerrity*, 190 Ill. 545; *Bradshaw v. Ashley*, 180 U. S. 59; *Harland v. Eastman*, 119 Ill. 22; *Ward v. McIntosh*, 12 Ohio St. 231; *Jayne v. Price*, 5 Taunt. 326; *Horn v. Jones*, 28 Cal. 194; *Nimo v. Jackman*, 21 Ill. App. 607; *Robinson v. Ferguson*, 78 Ill. 538; *Gage v. Gentzel*, 144 id. 450.

The removal of the tax title cloud was the one branch of the case which particularly affected appellant, and he had no concern with the other branch thereof, and could not assign error thereon. *South Chicago Brewing Co. v. Taylor*, 205 Ill. 132; *Hughes v. Carne*, 135 id. 519; *Harms v. Jacobs*, 160 id. 589; *Coombs v. Hertig*, 162 id. 171.

The Land Registration act (sec. 22) provides that the only pleading by adverse parties shall be an answer duly

verified, and that the answer shall have no greater weight as evidence than the application. Hurd's Stat. 1901, chap. 30, secs. 18, 22.

The provisions of the Land Registration act make a replication unnecessary. *Chambers v. Rowe*, 36 Ill. 171; *Jones v. Neely*, 72 id. 449.

Possession is shown by fencing property that is vacant and unoccupied. *Gage v. Hampton*, 127 Ill. 87.

Appellee, in this proceeding, did not need to specify the defects in appellant's title or make proof as to the same, as the burden of establishing his title was upon appellant. *Gage v. Caraher*, 125 Ill. 447; *Gage v. Electric Light Co.* 194 id. 30; *Smith v. Hutchinson*, 108 id. 662.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellee company, on the first day of April, 1903, filed in the circuit court of Cook county its application, under the provisions of an act entitled "An act concerning land titles," approved and in force May 1, 1899, (4 Starr & Cur. Stat. p. 259,) commonly known as the Land Registration act, for a decree declaring the title in fee simple in and to lots Nos. 191 and 192, in block 2, in Young & Clarkson's second addition to Kensington, Illinois, to be vested in it. The appellant and others were personally named as defendants, and he filed a sworn answer to the application. The cause was referred to the examiner of titles. Proof was taken and the report of the examiner of titles filed, and a decree was entered finding and declaring the appellee company to be the owner in fee simple of the title to the said lots, subject only to the payment to the appellant, Jacob Glos, and Emma J. Glos and D. Arnold, as their respective interests may appear, of the sum of \$6.73, "and that upon the payment, as aforesaid, of said sum to said defendants, Jacob Glos, Emma J. Glos and D. Arnold, or to the clerk of this court for their respective use, to be made within thirty days from this date, together with interest, as aforesaid,

the tax deed to Jacob Glos dated November 11, 1902, recorded November 13, 1902, as document No. 3,320,258, and the quit-claim deed from Jacob Glos to the defendants Emma J. Glos and D. Arnold dated March 11, 1903, recorded March 16, 1903, as document No. 3,363,014, be held and taken to be null and void and of no effect, in so far as either of said deeds conveys or affects said lots 191 and 192, in block 2, in Young & Clarkson's second addition to Kensington, and that upon the failure to pay said above specified sum, and interest, within said time, this application and this proceeding stand vacated and dismissed at applicant's costs." This is an appeal to bring the decree into review in this court.

The appellant, among other grounds urged for reversal, insists, first, that the proofs of title produced in behalf of the appellee company were wholly insufficient to establish title in fee simple in it for registration, as declared by the decree; second, that no proof was produced to show that the tax deed to himself was in any wise defective or invalid. The appellee, in response to the first of these complaints, insists that the appellant's position in the proceeding is the same as that of a defendant in a proceeding in equity to remove a tax deed as a cloud on the title of the complainant in the bill, and that in cases of that character no proof of complainant's title is required other than the *prima facie* proof of title arising from the production of a deed purporting to convey title to the complainant, and proof of possession of the premises under such claim of title; and as to the second of the complaints of appellant, the appellee insists that in proceedings under the act for the registration of land titles the applicant is not required to attack and overturn the title held by a party named as defendant in the application for a decree of registration, but such defendant must produce proof to establish the validity of his title, if any he claims or appears to have in the premises.

The complainant in a bill in equity to remove a tax deed as a cloud on his title to land, to entitle him to that relief, must allege in his bill the invalidity which he claims exists in the title or claim of the defendant, (*Gage v. McLaughlin*, 101 Ill. 155; *Gage v. Reid*, 104 id. 509;) and on the hearing must establish that allegation and show the invalidity of the title of his adversary. (6 Am. & Eng. Ency. of Law,—2d ed.—p. 157.) If the nature of the claim of title which is alleged to constitute a cloud is unknown, the complainant may allege such want of knowledge and make the holder of the claim a defendant, and he may be required to discover the nature and extent of his claim, and on the discovery the bill may be so amended as to allege the invalidity of such claim of title and entitle the complainant to the desired relief if he can prove the allegations of the bill as amended. (*Gage v. Reid*, *supra*.) In the case last cited we said (p. 513): "It would be anomalous to find titles invalid, or enjoin their assertion, without any pleadings or allegations upon which to base the relief. It would be an innovation on long, well established and familiar practice. It has been held in cases almost without number, that a complainant can only have such relief as he entitles himself to by the allegations of his bill, supported by proof."

In cases to remove clouds from titles we have held that the complainant's title may be sufficiently proved by establishing a *prima facie* case of ownership in fee; this for the reason it is essential to the right of the complainant to a decree in such cases, that he shall establish that his adversary's title is invalid and but a cloud on the title of the complainant. *Prima facie* proof of title in fee in the complainant in a bill to remove a cloud would not, of itself, entitle the complainant to a decree declaring the tax deed or other apparent title held by the defendant to be invalid, but, in addition to such *prima facie* case, the complainant, to entitle himself to a decree canceling the deed of the defendant, must allege

and prove the defendant's claim of title is but a mere cloud. The proceeding at bar is not a bill in equity to remove a cloud, but is an application, under the statute, for the initial registration of the title to the lots. The principal object to be subserved by this statute is, to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain, by an inspection of the register, who may convey to him the title. A proceeding under this statute, if it shall result in a decree of registration of the title of the applicant as the title in fee, should subject the titles of all parties to the proceeding, and every other title or claim to the land, to judicial investigation, in order that the true state of the title in fee should be ascertained and declared. The applicant for registration in the case at bar must therefore establish that the true title in fee is in him before he can have relief or require those whom he has brought before the court as defendants to bring their titles before the court for adjudication. If the applicant does not prove such a title as is entitled to be registered as a title in fee he cannot have relief, either in the way of the registration of his own title or a declaration finding that the adverse claimants have no title, or that the claims are but clouds on such *prima facie* title as the applicant may be able to show. If the applicant in a proceeding, under the statute, for the registration of his title, produces evidence establishing title in him, then those who had been brought in, under the application, as holders of claims to the title may be required to produce proof to establish the validity of their claims to the title or to a lien on the title, as the case may be. Defendants to the proceeding may therefore be heard in the trial court to urge that the applicant has not shown a title of the nature proper to be registered, for if that be true the application should be dismissed, and that without any regard whatever to the question whether the title or claims of the defendant to the title are but mere clouds.

While one who has shown a title entitled to be registered may not only have a decree to that effect, and may also have the claims of others who are defendants to his application decreed to be but clouds on his title, yet such applicant, if he fails to establish title in himself of the nature and character to be registered, cannot have a decree removing the defendants' claims as mere clouds on a mere *prima facie* case of ownership in himself, but his application should be dismissed. The appellant may therefore be heard to insist that the proofs as to title in fee of the appellee company were insufficient to support the decree.

The documentary evidence offered by the appellee company to support the findings of the decree that it possessed title in fee to the premises in question was the following: Sheriff's deed from the sheriff of Cook county to Kingman & Co., dated November 21, 1893, and recorded November 28, 1893; warranty deed dated May 6, 1890, from James C. Young and wife and Michael Clarkson and wife to Laurence Morrissey, recorded March 25, 1891; quit-claim deed dated May 23, 1902, from Laurence Morrissey and wife to Kingman & Co., recorded May 23, 1902; receipts showing payment of general taxes for the year 1895, special assessment paid in 1896, the general taxes for 1897, redemption and general taxes paid in 1898, the general taxes for 1898 paid in 1899, special assessment paid by Victor M. Harding in 1902. These deeds were in nowise shown to be connected with the title which emanated from the general government, and within themselves did not prove title in the appellee company. Such deeds constituted color of title, merely. The payment of taxes did not cover seven consecutive years, and did not operate to aid the deeds, as color of title, to ripen into title under any of our limitation laws. It cannot be conceived that any one would deliberately contend that the production of these deeds and of the tax receipts entitled the appellee company to a decree finding it to

be the owner in fee of the lots and decreeing that its title as such owner in fee should be registered. Counsel for appellee does not so contend, but his insistence, as before stated, is, that the deeds and tax receipts, together with the proof of possession hereafter referred to, were sufficient to establish a *prima facie* case of ownership in fee, and that, the appellant having produced no proof in support of his tax title, a *prima facie* case of ownership was sufficient to uphold a decree canceling his deed as a cloud, and he could not be heard to assign as for error that proof necessary to base a finding and decree that the appellee held title in fee had not been produced. The appellee is in error in that contention. The only proof as to possession was, in substance, as follows: The application of the appellee company for the registration of the lots was prepared, signed and sworn to by its secretary on the 18th day of March, 1903. The application alleged the lots were unoccupied. The application was filed on the first day of April, 1903. In the time intervening between the signing and verification of the application, and before filing it, the attorney who prepared and subsequently filed it went to the lots, caused a fence to be built around them and put up a sign giving notice that the lots belonged to the appellee company and were for sale by it. The application as previously prepared was then placed on file.

We need not consider whether, in a bill in equity by the appellee company to remove appellant's tax deed as a cloud because of invalidity set forth in the bill and proven on the hearing, these deeds, tax payments and acts of the attorney of appellee in connection with the possession of the lots relied upon to constitute possession would be sufficient proof of ownership to give the complainant standing to ask a decree as owner, for the reason that, as before explained, the applicant for initial registration, under the statute, of a title as a title in fee must produce proof that he is possessed of such title,

either by the production of a regular chain of conveyances from the general government, or by proof of the creation of a title by adverse, actual, open, continuous and hostile possession under claim of title for the period of twenty years, or by payment of taxes and possession of the premises under color of title, or payment of taxes alone, the premises being vacant, for the period necessary, under our Statute of Limitations, to the perfection of a title of that character.

The claim of ownership of the appellee company was not entitled to be registered, and the application should have been dismissed. Evidence establishing title good as against the world is essential to warrant a decree awarding initial registration of a title.

The decree is reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

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BENJAMIN CRAMER *et al.*

*v.*

JOHN C. BURKHALTER *et al.*

*Opinion filed December 16, 1903—Rehearing denied February 4, 1904.*

1. APPEALS AND ERRORS—*whether evidence proved giving of notice is a question of fact.* Whether the evidence proved the giving of notice by commissioners of highways of the meeting for taking action on a petition to lay out a road is a question of fact, which is conclusively settled by the judgment of the Appellate Court.

2. SAME—*when record presents no question for consideration of the Supreme Court.* The record of a suit at law tried without a jury presents no question for the consideration of the Supreme Court, where there is no objection to any of the evidence offered, no exception to any ruling of the court, no propositions of law submitted, and there is no exception to the finding or judgment of the court in the bill of exceptions.

*Cramer v. Burkhalter*, 108 Ill. App. 513, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Knox county; the Hon. JOHN A. GRAY, Judge, presiding.

CHIPERFIELD & CHIPERFIELD, for appellants.

FLETCHER CARNEY & JAMES M. CARNEY, and WILLIAMS, LAWRENCE & WELSH, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Upon the petition of appellees, the commissioners of highways of the town of Maquon, in Knox county, and two individuals who joined in the petition, the circuit court of said county awarded a peremptory writ of *mandamus* against appellants, the commissioners of highways of the town of Chestnut, in said county, commanding them, as such commissioners, to take the necessary steps to lay out a road on the division line between the two towns, by drawing orders for the payment of damages awarded, notifying owners to remove fences, directing the road to be worked, etc. A writ of error was sued out from the Appellate Court for the Second District, and the record being returned into that court, the judgment was affirmed. This appeal was prosecuted from such judgment of affirmance.

In the circuit court a jury was waived and the issues of fact made by the petition and the pleas of the defendants to the same were submitted to the court for trial, resulting in the finding and judgment in favor of the petitioners. The judgment of affirmance by the Appellate Court is conclusive of all controverted questions of fact, and the principal question presented and argued on this appeal is one purely of fact, as to whether the evidence proved the giving of the required statutory notice by the commissioners of the meeting at which they proposed to take action on the petition to lay out the

road. That question not being in any sense a question of law, we cannot consider it. There was no objection to any evidence offered at the trial nor any exception to any ruling of the court. No propositions of law were submitted to the court to be held or refused, and the bill of exceptions contains no exception to the finding or judgment of the court. There is no assignment of error which we can consider. *Bailey v. Smith*, 168 Ill. 84; *Aden, v. Road District No. 3*, 197 id. 220.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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E. S. PIKE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.

*Opinion filed December 16, 1903—Rehearing denied February 3, 1904.*

This case is controlled by the decision in *Crozer v. People ex rel.* 206 Ill. 464.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

TAYLOR & MARTIN, for appellant.

JAMES H. WILKERSON, County Attorney, WILLIAM F. STRUCKMANN, and FRANK L. SHEPARD, for appellee.

Per CURIAM: This case was consolidated in this court with the case of *Crozer v. People ex rel.* 206 Ill. 464. It involves the same question that is involved in that case and was submitted upon the same briefs, and is controlled by the decision in that case.

The judgment of the county court, therefore, will be reversed and the cause remanded to that court, with directions to enter a judgment sustaining the objections filed by the objector in that court.

*Reversed and remanded, with directions.*

THE CITY OF CHICAGO, in trust for use of Schools,

v.

THE CITY OF CHICAGO.

*Opinion filed December 16, 1903—Rehearing denied February 5, 1904.*

1. **TAXES**—*laws exempting property from taxation must be strictly construed.* Laws exempting property from taxation must be strictly construed, and nothing will be held to be within the exemption which does not clearly appear to be so.

2. **SPECIAL ASSESSMENTS**—*property exempt from taxation not necessarily exempt from special assessment.* Property which is by statute exempt from general taxation is not necessarily exempt from special assessment.

3. **SCHOOLS**—*school property not part of section 16 is subject to special assessments.* School property, not being a part of section 16 of the township nor derived therefrom, is subject to special assessment, whether occupied for school purposes, vacant, or occupied by buildings from which the school receives rent.

4. **SAME**—*special assessment proceeding as to school property not a suit against the State.* A special assessment proceeding against school property held in trust by a city for the benefit of the schools of the city, and not a part of section 16 of the township nor derived therefrom, is not a suit against the State, nor do the lands belong to the State of Illinois.

5. **SAME**—*payment of special assessment is proper application of school funds.* Payment of a special assessment against school property for improvements of benefit to the property is a proper method of applying the funds of the school district for benefit of its schools.

6. **SAME**—*Chicago board of education has implied power to sue and be sued.* Boards of education in cities having a population exceeding one hundred thousand have implied power to sue and be sued, although such power is not expressly given by sections 21, 22 and 23 of article 6 of the School law of 1889, prescribing the powers and duties of such boards.

7. **SAME**—*a special assessment of school property not defeated because property cannot be sold.* The fact that property held in trust by a city for school purposes cannot be sold for the purpose of collecting a special assessment against it does not defeat the assessment, since the law provides other methods by which the payment may be enforced.

APPEAL from the County Court of Cook county; the  
Hon. R. A. RUSSELL, Judge, presiding.

JAMES MAHER, and ANGUS R. SHANNON, for appellant:

The owner of public school property in the city of Chicago is the State of Illinois. To confirm a special assessment against any of said property involves a suit at law in reality against the State, though it is not nominally made a party of record. The law prohibits the suing of the State, and therefore no special assessment can be levied against public school property. Const. of 1870, art. 4, sec. 26.

The public school property and funds do virtually and in fact, although not in form, belong to the State. *Chicago v. People*, 80 Ill. 384; *Trustees v. Champaign County*, 76 id. 184; *Adams v. Brennan*, 177 id. 194.

The inhibition against suing the State is not limited to those cases wherein the State is made a party of record, but obtains in every case where it does not give its consent to be sued and where the obligation sought to be enforced in reality belongs to it. *Louisiana v. Jumel*, 107 U.S. 711; *Hogood v. Sothorn*, 117 id. 52; *In re Ayers*, 123 id. 443; *People v. Dulaney*, 96 Ill. 503.

The board of education of the city of Chicago, sued as the city of Chicago in trust for the use of the schools, is a governmental State agency. No authority of law exists for suing said governmental State agency. To confirm a special assessment against any public school property under jurisdiction of said State agency would involve a suing of said State agency, and, therefore, no special assessment can be levied against such public school property. *Kinnare v. Chicago*, 171 Ill. 332; *Bush v. Shipman*, 4 Scam. 186; *Throop on Public Officers*, sec. 593; *Dillon on Mun. Corp.* (4th ed.) sec. 963, and cases cited.

That boards of directors, boards of education, etc., derive their powers exclusively from the statutes has been adjudicated as follows: "The duties of school directors are derived exclusively from the statute, are specifically defined, and if they exercise powers and functions not conferred upon them, the statute has made

them responsible for all losses that may ensue." *Adams v. People*, 82 Ill. 132; *Stevenson v. School Directors*, 87 id. 255.

There is no common law authority for suing political divisions of the State, and without statutory enactment such divisions cannot be sued. *Schuyler County v. Mercer County*, 4 Gilm. 20; *Hollenbeck v. Winnebago County*, 95 Ill. 148; *County of Rock Island v. Steele*, 31 id. 543.

That boards of education in cities having a population exceeding one hundred thousand have not been authorized to sue and be sued is evident from the statutes. The legislature has provided for the government of school affairs by creating for certain districts school trustees, which it has specifically made bodies politic and corporate, with powers to sue and be sued. The legislature has created for certain other districts (and these obtain exclusively to cities with populations exceeding one hundred thousand, and to which the city of Chicago belongs,) boards of education, which it has not made bodies corporate and to which it has not granted authority to sue and be sued. The powers and duties of such boards of education are specifically mentioned, but nowhere is the power to sue or be sued granted. Act to establish and maintain free schools, in force May 21, 1889.

The power of the legislature to vest cities with power to make local improvements by special assessments, granted by section 9 of article 9 of the constitution of 1870, is subject to the restriction against using public school property for other than school purposes. *In re Mt. Vernon*, 147 Ill. 359.

ROBERT REDFIELD, and FRANK JOHNSTON, Jr., (EDGAR BRONSON TOLMAN, of counsel,) for appellee:

All public school lands which have been acquired by the board of education of the city of Chicago, otherwise than through the State by donation from the general government, are liable to special assessments for local improvements, whether used exclusively for school pur-

poses or not, whether vacant and unused, or whether leased out and the rents, issues and profits therefrom used for public school purposes. *Sioux City v. School District*, 55 Iowa, 150; *Bank v. State*, 69 id. 24; *Public Schools v. St. Louis*, 26 Mo. 468.

Although the property of charitable, religious and cemetery associations may be specially exempted from taxation, such exemption does not apply to special assessments for local improvements. *Bloomington Cemetery Ass. v. People*, 139 Ill. 16; *Lima v. Cemetery Ass.* 42 Ohio St. 128; *Ottawa v. Trustees*, 20 Ill. 423.

Public school lands cannot properly be regarded as property of the State, in the sense that suit against such lands would constitute suit against the State. *Ryan v. Gallatin County*, 14 Ill. 78; *Canal Trustees v. Chicago*, 12 id. 403; *Insurance Co. v. VanCleave*, 191 id. 410; *McLean County v. Bloomington*, 106 id. 209; *Bank v. State*, 69 Iowa, 30.

The board of education of the city of Chicago is not a separate, independent governmental agency, but is connected with, dependent upon and to some extent a part of the municipal government of that city. *McGurn v. Board of Education*, 133 Ill. 122; *Brenan v. People*, 176 id. 620.

The board of education of the city of Chicago possesses an implied incidental authority to sue and be sued in its corporate name. *Moore v. School Trustees*, 19 Ill. 83; *Adams v. Brennan*, 177 id. 194; *School District v. School District*, 63 Mich. 51; 1 Dillon on Mun. Corp. (4th ed.) sec. 443; 2 Beach on Public Corp. sec. 1377.

The payment of an assessment against school lands for local improvements would not constitute an indirect misappropriation or perversion of the school fund in violation of the constitution, but would be an incidental and proper expenditure for the improvement of the said property. *Bank v. State*, 69 Iowa, 24; *Sioux City v. School District*, 55 id. 150; *Public Schools v. St. Louis*, 26 Mo. 468.

To levy a special assessment against public school lands for local improvements would not necessitate the

taking of the charge and control of said property out of the hands of the board of education of Chicago, since the property would not be sold, and a special assessment is not a taking of property, nor would it constitute a lien thereon. *West Park Comrs. v. Chicago*, 152 Ill. 392.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The city of Chicago sought to improve, by special assessment, California avenue, in said city, from Washington boulevard to a point 378.8 feet north of the north line of Fulton street, by curbing, grading, and paving the same with asphalt. The board of education of said city was the owner of ten lots abutting on the line of the improvement, and at the time of the application for a confirmation of said special assessment against said lots, the board of education appeared in the county court of Cook county and objected to such confirmation, upon the ground that said property was in fact the property of the State of Illinois, and a confirmation of the assessment would, in fact, be a judgment against the State of Illinois; also for the further reason that said property was exempt from general taxation and from special assessment, and that said board had no funds out of which to pay such special assessment, and that the same could not be enforced by a sale of the land assessed. A hearing was had as to these objections upon an agreed state of facts, and the objections were each overruled and a judgment rendered confirming said assessment. From this judgment the board of education has appealed.

Upon the hearing in the county court it was agreed that of the ten pieces of property six were actually occupied by said board of education for school purposes. Two pieces were vacant and unoccupied, and from them the board received no rents and profits. The other two were occupied by buildings from which rents and profits were received, which were used for the benefit of the schools. It was also agreed that none of the lots were

a part of section 16, or acquired in any way from funds derived from that source.

Upon the hearing many propositions of law were submitted to the court, some of which were given and others refused. We do not deem it necessary to pass upon each of these propositions, because the decision of the case, stripped of all technicalities, involves the sole question whether or not the lots assessed were subject to special assessment.

The right of taxation is essential to the very existence of the government, and all property, of every description, in the State, is subject to taxation unless it has been specifically exempted. All laws exempting property must be subjected by the courts to a strict construction, and hence nothing will be held to be within the exemption which does not clearly appear so to be. (*People v. City of Chicago*, 124 Ill. 636; *In re Swigert*, 119 id. 88.) In the case of *People v. Trustees of Schools*, 118 Ill. 52, we were called upon to determine whether school property being a part of section 16, or derived therefrom, was subject to special assessment, and we there held as follows: "By the sixth section of the act of Congress enabling the people of Illinois to form a State constitution, it was enacted that 'the section numbered 16 in every township shall be granted to the State, for the use of the inhabitants of such township, for the use of schools.' Article 8, section 2, of the constitution of 1870, provides that 'all land, moneys or other property donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made,'"—and we there held that the property, being a part of section 16, was exempt from special assessment for local improvements. We have also held that there is a distinction between general taxation and special assessment, and that property which was exempt from general taxation was not necessarily exempt from spe-

cial assessment. See *Canal Trustees v. City of Chicago*, 12 Ill. 403; *Higgins v. City of Chicago*, 18 id. 276; *County of McLean v. City of Bloomington*, 106 id. 209; *County of Adams v. City of Quincy*, 130 id. 566.

In the case of *Bloomington Cemetery Ass. v. People*, 139 Ill. 16, we held that a clause in a charter of a cemetery association that the ground held for a burial place shall be exempt from general taxation and execution will not protect the lands so held against a special assessment or a special tax for local improvements. In the case of *County of McLean v. City of Bloomington*, *supra*, we said with reference to a special assessment for paving the court house square (p. 218): "The contention is, such property is expressly exempt from taxation, and special assessments are included within the meaning of the word 'taxation.' We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments to now admit that it is even debatable,"—citing the cases.

The distinction between taxation and special assessment is also clearly made in our present constitution. (Art. 9, secs. 1, 5, 9.) While providing that the General Assembly may exempt the property of the State, county and municipality from the former, section 3 makes no such provision in regard to the latter, but, on the contrary, by section 9 the General Assembly is authorized to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, without any restrictions as to the property to be assessed.

It is claimed, however, that this property is specially exempt under section 26 of article 4 of the constitution of 1870, and section 2 of article 8 of that constitution, and section 6 of article 12 of the act to establish and maintain a system of free schools. Section 26 of article 4 provides that the State shall not be a defendant in any suit. Section 2 of article 8 provides that all lands,

moneys or other property donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made. Section 6 of article 12 of the School law provides that the funds derived from the sale of section 16, "or from the sale of any real estate or other property taken on any judgment or for any debt due to the principal of any township or county fund, and all other funds of every other description," are declared to be a part of the principal of the township or county fund, and no such part shall be distributed or expended for any purpose whatever, but shall be loaned, etc., and that the rents, interest, issues and profits arising from said principal shall be distributed as provided by law, and that said rents and profits shall not be carried to the principal of the fund except it appear, on the first Monday in October, that there are rents or profits which are not required for distribution, etc. From a careful examination of these sections, and the construction placed upon them by the former decisions of this court, we do not think they specifically exempt the property in question in this case from special assessment.

It is contended, however, that this suit is, in fact, a suit against the State of Illinois, as the lands in question are the property of the people of the State of Illinois, and therefore this action cannot be maintained. We do not think this is a suit against the people of the State of Illinois, nor do the lands belong to the people of the State of Illinois. The title thereto is in the city of Chicago, in trust for the use of the schools in that city, and any interest which the people may have in the lots is confined to the people of the city of Chicago, rather than to the whole State of Illinois. Our statute expressly provides that boards of education may sue and be sued, and while it is contended that there is no such express provision with reference to the board of education of the city

of Chicago, yet we think the power to sue and be sued may be implied from the act, and that the suit in question is in reality a suit against said board of education, rather than against the people of the State of Illinois.

It is also insisted by appellant that the payment of this special assessment out of the school funds would be a diverting of said funds from the object for which they were created. We do not see how that position can be maintained. A special assessment may be levied for the purpose of paving streets, putting down sidewalks, putting in curbing, or for sewer purposes, all of which are, in theory, for the benefit of the property abutting on the line of the improvement. Undeniably all of these improvements are of great benefit, if not of actual necessity, to a public school, and from the most of them no property derives more benefit than does that of the board of education. They are as necessary to the practical use of the property as the furnishing of heat, light and air. Special assessment for such improvements is but a method of applying the funds of the school district for the benefit of its schools, and is legal and proper.

It is also insisted that there is no method under the law by means of which the property in question can be sold to enforce the collection of this assessment. It may be conceded the property cannot be sold to pay the assessment, but there are other methods provided by law by which the payment can be enforced in case the board of education refuses to pay the same.

It has been suggested, though not seriously insisted upon, in the briefs and arguments, that at least those lots which are vacant and unoccupied should be held exempt. We are unable to find any legal ground for such a distinction.

Our conclusion is, that the county court ruled correctly on all the questions submitted to it, and its judgment will accordingly be affirmed.

*Judgment affirmed.*

THE DUQUOIN WATER-WORKS COMPANY *et al.*

v.

SAMPLE G. PARKS.

*Opinion filed December 16, 1903—Rehearing denied February 4, 1904.*

1. APPEALS AND ERRORS—*when alleged error in refusing a continuance cannot be considered.* Alleged error in denying a continuance in a chancery case upon motion, supported by affidavit, cannot be considered on appeal or error, where the affidavit is not contained in the certificate of evidence.

2. SAME—*effect where certificate of judge is attached to record.* The certificate of the judge, attached to the record, that the record contains all the evidence, does not make a part of such record an affidavit for continuance copied therein by the clerk.

3. SAME—*when objection to disqualification of judge is waived.* One who obtains a change of venue but afterwards goes to trial before the same judge without objecting that the judge is disqualified, waives the right to assign the point as error.

4. ABSTRACT OF RECORD—*index to abstract is necessary requirement.* The preparation of an index to the abstract of record, as required by rule 14 of the Supreme Court, is a matter of importance, which appellant must not neglect.

WRIT OF ERROR to the Circuit Court of Perry county;  
the Hon. WILLIAM HARTZELL, Judge, presiding.

FRANKLIN A. MCCONAUGHY, (EDWARD S. ROBERT,  
and JOHN H. OVERALL, of counsel,) for plaintiffs in error.

GEORGE W. WALL, and B. W. POPE, for defendant in error.

Mr. JUSTICE RICKS delivered the opinion of the court:

This case comes to this court on a writ of error to review the record made in the circuit court of Perry county, wherein a decree was entered granting an injunction pursuant to the prayer of a bill filed by Sample G. Parks against the plaintiffs in error, praying for an injunction and that a certain ordinance be held to be void.

The bill was filed by Sample G. Parks, a tax-payer, etc., on the 8th day of July, 1899, and was brought to the November term, 1899, of the circuit court of said county, making the city of DuQuoin, Henry A. Keith, James H. Thompson and the DuQuoin Water-works Company parties defendant. The bill was afterwards amended, making the other plaintiffs in error, Breckenridge Jones, the Mississippi Valley Trust Company and the unknown holders of bonds and coupons of the DuQuoin Water-works Company, parties defendant. The purpose of the bill was to set aside and declare void an ordinance of the city of DuQuoin and enjoin the collection of bonds issued thereunder, on the ground that it imposed upon the city an indebtedness in the sum of over \$113,000 when the city was already indebted in excess of five per cent of the assessed valuation of its taxable property. The bill alleged that the value of the taxable property within the limits of the city, as fixed by the last assessment previous to the passage of the ordinance, was \$248,264, and that it was unlawful for the city to incur any indebtedness in excess of five per cent of said amount, to-wit, \$12,413.20, and that the existing indebtedness of the city at the time of the passage of the ordinance was more than five per cent; that the sum fixed in the said ordinance was greatly in excess of a fair price for the work to be done, which would be more than \$35,000. An amendment to the bill, filed by leave of court on November 6, 1899, alleged that there had been no compliance with paragraph 267a of chapter 24 of Hurd's Statutes of 1898, which provides that in case of the purchase or leasing of water-works the question must be first submitted to a vote of the people. The bill prayed for appropriate relief.

At the November term, 1899, the defendants filed their demurrer to the bill. Later, and while the demurrer was pending, a petition for a change of venue from presiding

Judge Hartzell was presented on behalf of defendants, which petition the judge granted and entered an order changing the venue to some other judge of the circuit. At the May term, 1900, Judge Burroughs presiding, the demurrer was partially argued, leave was given to file written arguments and the matter was taken under advisement. At the November term, 1900, an order was entered overruling the demurrer, with leave to answer by January 1, 1901. The defendants answered within the time fixed, admitting the passage of the ordinance; alleged that it was valid; denied that it involved any indebtedness prohibited by the constitution, and alleged an amendatory ordinance, etc. At the May term following, the amended bill was filed making the new parties defendant, and on November 14 a general answer was filed by all the defendants, except the city, to the bill as amended. The plaintiff withdrew his exceptions and filed a general replication. On November 19 the defendants, except the city, moved for a continuance. The motion was denied and the cause heard on the following day, November 20. After hearing the proofs and arguments the court took the case under advisement, and on December 21, 1901, the decree was rendered granting the relief prayed. A petition for a rehearing was filed by defendants, setting forth their reasons in writing, and said petition was denied by the court.

Numerous errors, fourteen in number, are assigned of record, but only two of the errors assigned are argued by counsel for plaintiffs in error, one being as to the refusal of the court to grant the continuance upon motion and affidavit filed in support of the said motion, and the other error argued being that the court, after granting the change of venue, proceeded to hear the cause and entered its decree. The other errors, not being argued, are therefore considered abandoned.

As to the first of the errors above mentioned, being as to the refusal of the court to grant a continuance up-

on the motion and affidavit in support thereof, it cannot be considered by us, for the reason that the affidavit is not made a part of the record by a certificate of evidence, and it is not, therefore, before us for consideration. The plaintiffs in error, in order to obtain the benefit of the affidavit in this court, should have made the same a part of the record by the certificate of the judge who heard the cause in the circuit court. This was not done. The affidavit supporting the motion for a continuance is copied by the clerk in the record proper but is not included in the certificate of evidence signed by the judge, and is not, therefore, properly part of the record. The certificate of the judge attached to the record, that it contained all the evidence, is not sufficient to make the affidavit for a continuance a part of the record simply because such affidavit was copied into the record by the clerk. *Heacock v. Hosmer*, 109 Ill. 245; *Lange v. Heyer*, 195 id. 420.

As to the other error relied upon by plaintiffs in error, namely, the fact that the court, after granting a change of venue, proceeded to hear the cause and entered his decree therein, it may be said the plaintiffs in error, when the cause was finally tried, did not urge the disqualification of the trial judge because of the change of venue that had previously been granted, and, as frequently held, if a party seeks or obtains a change of venue from one of the judges of the court and afterwards goes to trial before the same judge without objecting that the judge is disqualified, he waives the point and cannot urge it as a ground of reversal on appeal or writ of error. *Johnson v. VonKettler*, 66 Ill. 63; *Flagg v. Roberts*, 67 id. 485; *Noyes v. Kern*, 94 id. 521; *Sampson v. People*, 188 id. 592; 11 Ency. of Pl. & Pr. 782.

There is no index to the abstract, as required under rule 14 of this court, which requires the abstract to contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, etc. This is a matter of importance to this court, especially

where the abstract is of any size, as in this case, and should not be overlooked.

After full consideration of this case we find no error which would justify us in reversing the decree of the circuit court, and that decree is accordingly affirmed.

*Decree affirmed.*

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218	466
218	467

THE PEOPLE *ex rel.* W. H. Trobaugh, County Collector,  
v.

J. C. GLENN *et al.*

*Opinion filed December 16, 1903—Rehearing denied February 4, 1904.*

1. DRAINAGE—*power of drainage commissioners to impose a tax is limited.* The power of drainage commissioners to impose a tax is a limited one and must be strictly construed.

2. SAME—*when certificate of drainage commissioners is insufficient.* A certificate of the commissioners of a special drainage district is insufficient which specifies the amount desired to be raised by taxation in a gross sum, instead of stating the several amounts required to be raised for the various purposes specified in section 70 of the Drainage act of 1885. (Laws of 1885, p. 104.)

3. SAME—*a certificate of drainage commissioners cannot be amended.* Since the authority of the county clerk to extend a local drainage tax is the certificate of the drainage commissioners, defects in such certificate which render the tax invalid cannot be cured, on application for sale, by introducing the drainage record, the report of the commissioners and parol evidence.

4. TAXES—*provisions of statute designed to protect the tax-payer are mandatory.* Provisions of a statute designed for the protection of tax-payers are mandatory, and a disregard of them renders the tax illegal.

APPEAL from the County Court of Jackson county;  
the Hon. W. F. ELLIS, Judge, presiding.

This is an application by the county collector of Jackson county, in the county court of said county, for a judgment of sale against certain lands of the appellees for a drainage tax extended against said lands by the county clerk by virtue of a certificate of levy of the

commissioners of the Big Lake special drainage district. The appellees appeared and filed objections, which were sustained and judgment was refused, and an appeal has been prosecuted to this court.

The certificate of the commissioners is in the following form:

*"To D. L. Boucher, County Clerk:*

"We, the commissioners of the Big Lake special drainage district, in the county of Jackson and State of Illinois, make and file with you, pursuant to the provisions and requirements of section 70 of the act of the General Assembly of this State approved June 27, A. D. 1885, in force July 1, A. D. 1885, entitled 'An act to provide for drainage for agricultural and sanitary purposes and to repeal certain acts therein named,' and of the various acts amendatory of and supplementary to said act, the following statement: That during the fiscal year of the said drainage district ending on the 31st day of October, A. D. 1902, no notes, bonds or other evidences of indebtedness of or against the said drainage district were made or issued by the commissioners thereof. We further state and certify to you that we shall require during the fiscal year of the said drainage district ending the 31st day of October, A. D. 1903, for the payment of interest and principal maturing on certificates and other evidences of indebtedness not registered, for costs and expenses of carrying on the work of dredging and repairs of drains and ditches, and for ordinary and contingent expenses, including costs of collection and disbursement, the sum of four thousand dollars (\$4000.00), to be levied upon the lands and property, including railroad, within and of the said drainage district benefited, which sum you are directed and required to apportion to and among the various tracts of land and property, including railroad, as other drainage assessments and taxes, in addition to such sums or sum as may have been or may be certified to you by the Auditor of Public Accounts, pursuant to law, for payment of interest, or interest and principal, upon the registered indebtedness of the district.

"Dated, November 21, A. D. 1902.

H. L. BRICKEY,  
HENRY ARBEITER,  
WM. WALTHER,  
*Commissioners.*

Filed Nov. 21, 1902.—D. L. BOUCHER, *County Clerk.*"

The section of the statute authorizing the certificate to be made and the tax to be extended reads as follows: "It shall be the duty of the commissioners of every special drainage district heretofore organized under any law of this State, as also the commissioners of every such district hereafter organized, to file on or before the first day of December of each year, with the county clerk of the county in which the district was or may be organized, a statement of the date, number and amount of all notes or bonds issued by them as such commissioners, and which remain unpaid, the time the same will mature, the rate of interest such notes or bonds bear and the time the interest falls due, the amount necessary to be levied on the lands assessed for benefits in order to meet the payment of the interest for the ensuing year; also the amount, if any, necessary to be levied to keep the work, or any part thereof, in repair for the year next ensuing; also the amount of any deficiency in the payment of interest before accrued, or in the payment for repairs made; and the clerk shall compute the *pro rata* share which each tract or parcel of land or property in said district, assessed for benefits, will have to pay to raise said respective amounts, which *pro rata* share shall be in the same proportion as the assessment for the construction of said work, and it shall be the duty of the county clerk of the county in which the lands are located to extend the same on the collector's book, the same as State, county, municipal or other taxes are extended, in appropriate column or columns, and in case the lands or property assessed lie in more than one county, the county clerk of the county in which the district is organized shall certify to the clerk, or clerks, of such other county or counties, a description of the lands or property assessed in such other county, and the amount to be extended against the same for interest, as also for repairs, either or both, and on receiving such certificate the clerk of the proper county shall extend the same on the proper collector's book, in

proper columns, the same as though the whole proceedings and district were in his county. And the amounts so extended shall be collected at the same time and in the same manner as other taxes on like property, and shall be paid over by the party collecting, to the treasurer of the drainage district, in the same time and manner as taxes collected are required to be paid to treasurers of municipal corporations. No levy or assessment made by the commissioners to meet the payment of interest on the notes or bonds of the district unpaid shall be used for any other purpose, but shall be faithfully applied to the payment of such interest as it becomes due: *Provided*, where the whole or any part of the bonds of the district are registered, and the Auditor of Public Accounts has levied, as hereinbefore provided, an amount sufficient to meet the payment of the interest on such registered bonds as it becomes due, then the commissioners shall make their levy so as to meet the payment of the interest on the bonds that are not registered." (2 Starr & Cur. Stat. chap. 42, sec. 70, p. 1567.)

JOHN VENABLE, State's Attorney, (R. J. STEPHENS, of counsel,) for appellant.

OTIS F. GLENN, and JAMES H. MARTIN, for appellee.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

It is too plain to admit of argument to the contrary that the certificate of the commissioners does not conform to the requirements of the statute. The statute requires the certificate to state (1) the date, number and amount of all notes or bonds issued by the commissioners which remain unpaid, the time of their maturity, the rate of interest they bear and the time when the interest falls due; (2) the amount necessary to be levied on the lands assessed for benefits in order to meet the payment of the interest for the ensuing year; (3) the amount,

if any, necessary to be levied to keep the work, or any part thereof, in repair for the next ensuing year; and (4) the amount of any deficiency in the payment of interest before accrued or in the payment for repairs made. This the certificate failed to do, and the amount proposed to be raised is named in a gross sum, to-wit, the sum of \$4000. The power of the commissioners to impose a tax is a limited power and is to be strictly construed. (*Commissioners of Highways v. Newell*, 80 Ill. 587.) The statute clearly contemplates that the several amounts to be levied for interest, repairs, or to meet a deficiency for accrued interest or for repairs already made, should be stated. The provisions of the statute are intended for the protection of the tax-payer, and are mandatory. The tax-payer has the right to be informed for what purposes his property is to be taxed, and the statute provides that the amount collected with which to pay interest shall be kept separate from the balance of the tax levied and collected under said section of the statute.

The appellant, on the trial, appears to have conceded the certificate was insufficient, and, although no motion was made to amend the certificate, it was in the county court sought to remedy its defects by introducing the drainage record, the report of the commissioners as approved by the county judge, and parol evidence. The defects in the certificate could not be thus cured. The authority of the county clerk to extend said drainage tax is the certificate of the commissioners, and unless a valid certificate is on file in his office he is powerless to extend the tax. *Peoria, Decatur and Evansville Railway Co. v. People*, 141 Ill. 483.

It is, however, urged, that the objections made to the extension and collection of this tax do not affect the substantial justice of the tax, and that the defects pointed out in the certificate are cured by section 191 of the Revenue act. We held in *Chicago and Eastern Illinois Railroad Co. v. People*, 200 Ill. 237, that the provisions of a statute de-

signed for the protection of the tax-payer are mandatory and a disregard of them will render a tax illegal, and that the substantial justice of a tax is affected if the authorities authorized to impose it have no power to levy it.

From an examination of this record it clearly appears that the certificate of the commissioners was not sufficient to authorize the county clerk to extend said tax, and that the county court properly refused to order the sale of appellees' land to pay said tax. The judgment of the county court will therefore be affirmed.

*Judgment affirmed.*

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L. F. BOWYER

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.

*Opinion filed December 16, 1903—Rehearing denied February 3, 1904.*

This case is controlled by the decision in *Crozer v. People ex rel.* 206 Ill. 464.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

TAYLOR & MARTIN, for appellant.

JAMES H. WILKERSON, County Attorney, WILLIAM F. STRUCKMANN, and FRANK L. SHEPARD, for appellee.

Per CURIAM: This case was consolidated in this court with the case of *Crozer v. People ex rel.* 206 Ill. 464. It involves the same question that is involved in that case and was submitted upon the same briefs, and is controlled by the decision in that case.

The judgment of the county court, therefore, will be reversed and the cause remanded to that court, with directions to enter a judgment sustaining the objections filed by the objector in that court.

*Reversed and remanded, with directions.*

HENRY H. GAGE

v.

THE CITY OF CHICAGO.

*Opinion filed December 16, 1903—Rehearing denied February 4, 1904.*

1. SPECIAL ASSESSMENTS—*it is conclusively presumed that improvement board's action was voluntary.* It is conclusively presumed that the improvement board acted of its own motion in preparing and submitting an improvement ordinance to the council, and that it treated an order from the council to prepare and submit the ordinance as a mere petition.

2. SAME—*when ordinance is not uncertain in describing asphaltum.* A provision in a paving ordinance that the asphaltum "shall be asphaltum obtained from Pitch Lake, in the island of Trinidad, or asphaltum which shall be equal in quality for paving purposes to that obtained from Pitch Lake," etc., is valid and certain.

3. SAME—*when provision for "back-filling" is valid.* A provision in a paving ordinance for "back-filling" the combined curb and gutter is sufficiently definite where the grade of the street and the height of the curb are given, and the filling is specified to be of earth, to the width of four feet at the top of the curb and even therewith, and to slope down at a specified rate.

4. SAME—*improvement board's resolution need not go into detail.* The resolution of the improvement board must prescribe the "extent, nature, kind, character and estimated cost" of the improvement, but a detailed description such as is essential to the validity of the ordinance is not required.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

F. W. BECKER, for appellant.

WILLIAM M. PINDELL, (CHARLES M. WALKER, and EDGAR BRONSON TOLMAN, of counsel,) for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from a judgment confirming a special assessment levied under the provisions of an ordinance of the city of Chicago providing for plastering sub-walls, constructing granite concrete gutters, a gran-

ite concrete combined curb and gutter, grading, and paving with asphalt, North Wood street from Kinzie street to West North avenue.

It is insisted that the scheme for the improvement of the street was not originated by the board of local improvements. In November, 1900, the board of local improvements had under consideration the advisability of recommending to the city council, for adoption, an ordinance providing for paving North Wood street from Chicago avenue to Milwaukee avenue with paving brick. The board of local improvements had ordered that an estimate be made of the cost of improving that portion of the street with brick. While the board of local improvements were awaiting the estimate of the cost of paving with brick, the city council of the city adopted the following order:

*"Council order Nov. 12, 1900.*—Ordered that the board of local improvements be and they are hereby directed to prepare and submit to this council an ordinance for paving with asphalt North Wood street from Kinzie street to North avenue. Presented by Messrs. Beilfuss, and Maypole, Strauss, Leininger, Kunz, aldermen 14th, 15th and 16th wards.

WM. LOEFLER, *City Clerk.*"

On the 13th day of August, 1901, the board of local improvements entered the following order: "On the recommendation of the secretary the previous order for an estimate for paving with brick Wood street from Chicago avenue to Milwaukee avenue was rescinded, and an estimate ordered, in compliance with the order of council, for paving said street with asphalt, from Kinzie street to North avenue." Afterwards, on the 15th day of April, 1902, the city council adopted an ordinance presented by the board of local improvements, providing for the paving of North Wood street for the distances as prescribed in the order of the city council, and with asphalt as prescribed in said order.

In *Walker v. City of Chicago*, 202 Ill. 531, we held the board of local improvements possessed the sole power to

originate a scheme for a local improvement without petition and of its own motion; that the city council had no power to direct or in any way control the board, and that any order or resolution of the city council ordering the board of local improvements to prepare and present an ordinance for an improvement was absolutely void, and that out of the official action of the board of local improvements in preparing and recommending an ordinance to the city council for an improvement, arose a conclusive presumption that the board acted upon its own motion or treated the resolution of the city council as a mere petition. That ruling is applicable to the contention here presented and decides it adversely to the appellant.

The ordinance provided that all asphaltum required to be used in the improvement "shall be asphaltum obtained from Pitch Lake, in the island of Trinidad, or asphaltum which shall be equal in quality for paving purposes to that obtained from Pitch Lake, in the island of Trinidad." It is objected that the ordinance is in this respect uncertain, in that it, to quote from appellant's brief, "gives some one (not named) the discretion to substitute for the asphalt specified, another and different asphalt not specified, and clothes him with authority to judge whether it is equal in quality for paving purposes, —a debatable question, upon which minds might differ according to their interests." This objection is without force. The provision in the ordinance was, no doubt, incorporated therein for the purpose of obviating the objection which was found fatal to an ordinance under consideration in *Fishburn v. City of Chicago*, 171 Ill. 338. The ordinance under consideration in the case cited, required that "the cementing material shall be a paving cement prepared from refined Trinidad asphaltum obtained from Pitch Lake, in the island of Trinidad," the effect being, as we there pointed out, to create a monopoly in favor of the corporation which had the absolute

control of the asphaltum obtained from Pitch Lake and to restrict competition in bidding for contracts for the construction of the improvement. We there said (p. 343): "If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed."

It is urged, however, that the ordinance under consideration here does not provide that the asphaltum, if other than that obtained from Pitch Lake is used, shall be equal, in all respects, to that from Pitch Lake, but only that it shall be "equal in quality for paving purposes." As the asphaltum was to be used for no other than paving purposes, its quality and fitness for such purpose was all that need be considered. The ordinance did not vest in the contractor, or any other person, power or discretion to determine the quality of asphaltum to be used. The ordinance fixed the standard of quality, and required that the material to be used should be equal to that standard. In *Hintze v. City of Elgin*, 186 Ill. 251, an ordinance which provided, "all brick to be used shall be made of pure shale, of equal quality to that found in Galesburg, Glen Carbon and Streator, in the State of Illinois, and Canton, in the State of Ohio," was held to be sufficiently specific.

Nor is the ordinance uncertain as to the depth and quantity of earth with which the combined curb and gutter-flaps were required to be "back-filled." The ordinance provided that the curb and gutter should be back-filled with earth, the filling to be of the width of four feet at the top of the curb and even therewith, and to slope down at the rate of one and one-half feet horizontal to

each vertical foot. The ordinance further provided that the upper surface of the gutter-flaps should conform to the surface of the finished roadway, and the top edge of the curb should coincide with the grade of said Wood street. The ordinance also fixed the grade of the street, from which the level of the surface of the finished roadway, which depended, of course, upon the conformation of the ground, could be ascertained with certainty. The ordinance contained the necessary data for determining the depth of the back-filling and the quantity of earth necessary to be used in that part of the work.

The ordinance provided that on the layer of Portland cement concrete six inches in thickness there should be laid a binder course of broken limestone mixed with asphaltic cement one and one-half inches in thickness, and upon this a wearing surface composed of carbonate of lime and asphaltic cement. The resolution of the board does not specifically mention the binder course of broken limestone or the wearing surface. For this reason it is urged the improvement described in the ordinance is not that described in the resolution of the board. An ordinance must prescribe the nature, character, locality and description of the improvement. It is not required that the resolution shall prescribe the "description of the improvement," but only the "extent, nature, kind, character and estimated cost" thereof. (4 Starr & Cur. Stat. chap. 24, pars. 43, 44, pp. 151-153.) The resolution here under consideration answered these requirements of the statute, and more minuteness in matter of mere description in the resolution was not necessary.

The judgment is affirmed.

*Judgment affirmed.*

HENRY H. GAGE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.*Opinion filed December 16, 1903—Rehearing denied February 16, 1904.*

1. *RES JUDICATA*—*when judgment of reversal is not res judicata.* A judgment of reversal upon error confessed as to a particular matter is not *res judicata*, on second appeal, as to assignments of error urged but not considered on the former appeal.

2. *SPECIAL ASSESSMENTS*—*when absence of itemized estimate of cost cannot be shown.* The absence of an itemized estimate of cost from the record of the resolution for the improvement cannot be shown by extrinsic evidence upon application for judgment of sale.

3. *SAME*—*effect of the eight-hour day and anti-alien labor provisions.* Provisions for an eight-hour day and prohibiting employment of alien labor, contained in the specifications for a local improvement, do not justify refusing judgment of sale unless it appears such provisions in some way entered into the competitive bidding.

4. *SAME*—*what raises presumption that illegal provisions entered into competitive bidding.* Where the specifications for a local improvement contain provisions for an eight-hour day and against employing alien labor, and such provisions are referred to in the advertisement and the bid and made a part of the contract, the presumption arises that they actually entered into the competitive bidding; but this presumption may be rebutted upon application for judgment of sale.

5. *SAME*—*when judgment of sale is defective.* A judgment of sale for a delinquent special assessment is defective which fails to identify the property against which the judgment stands.

6. *APPEALS AND ERRORS*—*effect where defective judgment is the only error.* Where the only error in a proceeding for judgment of sale is a defect in the form of the judgment entered, a new trial will not be awarded, but the case will be reversed, with directions to the trial court to enter a correct judgment.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD, and WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, of counsel,) for appellee.

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Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county against the property of appellant for the first and second installments of a special assessment made for paving Turner avenue, in the city of Chicago, which installments had been returned as delinquent.

At the July term, 1902, the county collector made application to the county court of that county for judgment against the same real estate for the same installments of this special assessment. The objections then made were: First, that the contracts for making said improvement were not let to the lowest responsible bidder; second, that said contract provided, in the prosecution of said work, eight hours should constitute a day's labor, and that said contractor should not employ, or permit to be employed, any persons other than citizens of the United States, which contract was so drawn in accordance with an ordinance of the city of Chicago; third, that the proposal or bid for said work was based, in part, upon said provisions; fourth, that the entry of judgment herein would deprive the objector of property without due process of law, etc. The court overruled these objections, and entered judgment on July 28, 1902, against the property for the delinquent installments. Gage appealed from that judgment to this court, and assigned as error the overruling of each of said objections, and also the fact that the judgment entered did not conform to the statute, and the further fact that the judgment was not signed by the judge. Appellee filed in this court a confession that there was error in the record, in that the judgment and order of sale were not signed by the judge, and upon that confession, without considering the other errors assigned, this court reversed the judgment and remanded the cause to the county court of Cook county for further proceedings, where the cause was re-docketed on April 25, 1903.

The matter was again presented to the county court at its July term, 1903, when Gage again presented objections in substance the same as those presented at the former hearing, and in addition he objected that the issues involved were *res judicata* by the decision and mandate of this court on the appeal from the judgment of July, 1902, and that upon remandment the former application was re-docketed and is still pending in said county court.

In support of the contention that this matter is *res judicata*, it is argued that because the same errors were assigned on overruling the same objections on the former appeal, and inasmuch as the judgment was then reversed, it must be presumed that the judgment of this court was that all the errors which were assigned were well assigned, and reliance is placed upon *Johnson v. VonKettler*, 84 Ill. 315. In that case, which was then in this court for the third time, appellant re-argued a question which had been decided by this court upon an earlier appeal, and this court held that it would not again consider the point; that if the appellant had desired to re-argue the proposition he should have presented his petition for a modification of the former opinion in apt time.

In *Smyth v. Neff*, 123 Ill. 310, the validity of a tax deed was involved. The case had been before in this court on an appeal from a judgment in an action of ejectment, in which the court below had held a certain tax deed involved in the suit invalid. This court, on the first appeal, had reversed that judgment and remanded the cause, holding that the objections made against the tax deed were not sufficient to invalidate it and that it should have been held good. When the case came the second time to this court this court said: "Concerning the points considered by the court in its former opinion, the discussion must now be regarded as forever closed, and the decision adverse to the defendant must stand." It is said that the additional testimony heard on the second trial

in the court below was as to a matter of no consequence, and that to consider again the question of the validity of the tax deed "would simply be to reconsider the case upon exactly the same record. That is not allowable under any practice that has ever obtained in this State." To the same effect are the other cases cited by appellant.

We think the present case plainly distinguishable from those above referred to. The assignments of error, other than that calling attention to the fact that the judgment lacked the signature of the judge, were not considered by this court at all, and the fact that this court, on confession by appellee, held that assignment good does not mean that all other errors assigned were meritorious.

It is said that this application is a different application from the one upon which judgment was entered in July, 1902; that the former application is still pending, and it was therefore error to enter judgment in this second application for the same installments of the special assessment that were covered by the first application. It does not certainly appear that there were two independent applications. The bill of exceptions, in reciting the evidence offered by objector, after showing the final order of this court filed in the county court on April 11, 1903, contains this language: "Also the order of this court entered April 25, 1903, re-docketing said cause, which, it was shown, is the final order entered." If this order, which does not appear elsewhere in the transcript of the record, was introduced in evidence, it should have been set out in full in the bill of exceptions, so that this court could see what the order was. What is meant by the recital that this was the final order we are unable to determine, because it appears from the transcript that thereafter the judgment appealed from was entered by the county court on August 3, 1903, overruling the objections and directing a sale, and it does not appear from the abstract that there were two applications pending for judgments against the same property for the same

installments at the same time. The notice of application by the collector for judgment, which is set out in the transcript, appears to be a notice of application for judgment for the third installment of this special assessment, and in nowise supports appellant's contention that there was a second independent proceeding instituted for the collection of the first and second installments.

We therefore conclude, notwithstanding the recital in the bill of exceptions in reference to the order entered April 25, 1903, that upon a consideration of the entire record it does not appear that there were two separate proceedings pending at the same time for the collection of these two installments.

On the trial below appellant offered evidence to show that no itemized estimate of the cost of this improvement was made a part of the record of the first resolution of the board of local improvements. Under the authority of *Bickerdike v. City of Chicago*, 203 Ill. 636, this objection would have been a good objection had it been made to the confirmation of the assessment. Not being made, however, until the time of the application for judgment for delinquent installments of that assessment, it is in the nature of a collateral attack upon the judgment of the county court confirming the assessment. We have frequently held that no defense which existed at the time the judgment of confirmation was entered, and which might have been interposed in that proceeding, can be made upon an application for judgment for the sale of real estate to satisfy the special assessment unless it be shown that the county court did not have jurisdiction of the proceeding to confirm the assessment; (*Leitch v. People*, 183 Ill. 569; *Pipher v. People*, id. 436; *Perisho v. People*, 185 id. 334; *People v. Talmadge*, 194 id. 67;) and that lack of jurisdiction must be made to appear from the record of the county court itself, otherwise such lack of jurisdiction cannot be taken advantage of in a collateral proceeding such as this is. (*Dickey v. People*,

160 Ill. 633; *Young v. People*, 171 id. 299; *Casey v. People*, 165 id. 49.) The evidence offered was therefore properly excluded.

Appellant refers to *City of Chicago v. Nodeck*, 202 Ill. 257, where it was held that the court had been without jurisdiction to enter a judgment of confirmation in a special assessment proceeding, for the reason that the ordinance providing for the improvement included, as a part of such improvement, certain paving which the city was without power to do by special assessment, and it was there held that the objection that the lack of jurisdiction must appear from the record of the county court would not be considered, for the reason that the party seeking to sustain such judgment had entered into a stipulation which showed that the county court was without jurisdiction, and having so stipulated he would not be heard to say that such lack of jurisdiction must appear from the record. Whether the absence of the itemized statement in the record of the first resolution of the board of local improvements would affect the jurisdiction of the county court to enter the judgment of confirmation, even if such absence appeared from the record of that court, or whether it is merely a defense to the proceeding for confirmation which is waived if not interposed before judgment, is a question which does not arise here, for the reason that appellant has not shown, or sought to show, and presumably cannot show, by the record of that court, such absence of the itemized estimate under discussion.

The specifications for the work necessary to carry out this improvement contained the eight-hour and the so-called alien labor clauses, referred to in the objections above set forth, and these specifications were referred to in the advertisements for bids, the bid and the contract, and a copy of such specifications was attached to and made a part of the contract, these two provisions being the same provisions as those on these subjects which are

fully set out in *McChesney v. People*, 200 Ill. 146. As the specifications contained these provisions and they were referred to in the advertisement and the bid and made a part of the contract, the presumption would thereby arise that they actually entered into the competition for the contract. This presumption, however, is one which may be rebutted. Appellee introduced evidence which shows that contractors in the city of Chicago, engaged in the business of constructing improvements of the character here involved, make their bids on the basis that such provisions are inoperative and void, and which shows that such provisions, when contained in such contracts, have been invariably disregarded both by the city and the contractors,—a course which is not surprising, perhaps, in view of the holding of this court as to the legality of such provisions, found in the case of *Fiske v. People*, 188 Ill. 206. Upon the entire record, it is apparent to us that these provisions of the specifications did not actually enter into the competition for the contract. In *McChesney v. People*, 200 Ill. 146, the conclusion reached by this court, at page 152, was that the property owner, to sustain his objection, must show that such provisions “actually entered into the competition in some way.” There was no error in overruling the objections based upon these provisions of the specifications.

The judgment of the county court in this case is in the following words: “And thereupon it is considered by the court that judgment of sale be and is hereby entered against the property of said objector in favor of the People of the State of Illinois for the amount of special assessment, interest, penalties and costs due thereon. It is further ordered that the property of said objector be sold, as the law directs, to satisfy the amount of special assessments, interests, penalties and costs due thereon, as aforesaid.”

We do not think this judgment complies with the law. It is substantially the same as that disapproved in *Mc-*

*Chesney v. People*, 174 Ill. 46, the only material difference being, that in that case the judgment was, "it is ordered that judgment of sale" be entered, while here the language is, "thereupon it is considered by the court that judgment of sale" be entered, and while the record is thus given the language characteristic of a judgment, it still fails to comply with section 191 of chapter 120 of Hurd's Revised Statutes of 1901, where a form for a judgment for delinquent taxes or special assessments is set out, with which the judgment in cases of this character must substantially comply. Following that form, the judgment should be entered "against the aforesaid tract or tracts \* \* \* in favor of the People of the State of Illinois for the sum annexed to each." The word "aforesaid," as used here, has reference to the descriptions of real estate on which the special assessments or taxes are delinquent, which descriptions are contained in a list which precedes the judgment, and are contained in the application for judgment, and which list, with the judgment, should be found in the "judgment, sale and redemption record" of the county court.

From the judgment in the case at bar it is impossible to tell what property of the objector the judgment is against. Appellee insists that the judgment should be read in connection with the application and list which precede it in the last mentioned record. This does not help it, as it fails to refer to the list which precedes it, or to anything else in the record from which a description of the real estate against which the judgment is intended to be entered can be obtained.

The form given in this section of the statute should be followed, modifying it so that it will apply to special assessments alone, and if the judgment be not entered against all of the tracts contained in the delinquent list which precedes the judgment, then the tracts against which the judgment is entered should be particularly specified, which may be done by referring to them as ap-

pearing opposite the name of the objector on that list, or if tracts appear opposite his name on that list against which judgment is not entered, then it may be done by setting out in the judgment a particular description of the tracts against which the judgment is entered, and reference, by apt words, may be had to the list for the amount of the special assessment, interest, penalties and costs due thereon.

As no error intervened in this proceeding prior to the entry of the judgment a new trial will not be awarded, but the judgment of the county court will be reversed and the cause remanded, with leave to the attorney for appellee to move for, and with directions to the county court to enter, a judgment in compliance with section 191 of chapter 120 of Hurd's Revised Statutes of 1901.

*Reversed and remanded, with directions.*

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JACOB GLOS

v.

SARAH LOUISE CESSNA.

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*Opinion filed December 16, 1903—Rehearing denied February 5, 1904.*

1. **REGISTRATION OF TITLES**—*proper foundation must be laid in registration suit for introduction of abstract of title.* Abstracts of title or books of abstracts are not admissible in evidence in a proceeding for initial registration of title unless a proper foundation has been laid as in other cases.

2. **SAME**—*applicant must prove title as against the world.* An applicant for initial registration of title in fee simple must make such proof as warrants registration of such title as against the world, and not merely such title as would be sufficient to authorize a decree removing a cloud.

3. **SAME**—*cloud cannot be removed unless evidence justifies registration of title.* Unless the applicant for initial registration of a title in fee simple shows a title which may be registered as against the world, the court cannot remove a tax deed alleged to be a cloud but must dismiss the application. (*Glos v. Kingman & Co. ante*, p. 26, followed.)

APPEAL from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

JACOB GLOS, *pro se*, (JOHN R. O'CONNOR, of counsel.)

T. F. MONAHAN, and WILLIAM S. NEWBURGHER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On December 6, 1902, appellee, Sarah Louise Cessna, filed in the office of the clerk of the circuit court of Cook county her application to the court to register her title to a lot in Chicago pursuant to an act concerning land titles, in force May 1, 1897. The application stated that her estate in the lot was in fee simple, subject to a certain trust deed; that no other person claimed any interest in the lot except appellant, Jacob Glos, and Emma J. Glos, whose claim was an alleged tax deed, and that the premises were unoccupied, which latter averment the court afterward allowed to be amended so as to show that she was in possession. She prayed the court to find and declare her title or interest in the lot, to decree the same and order the registrar of titles to register the same, and to grant such other and further relief as should be according to equity. The appellant, Jacob Glos, and Emma J. Glos, appeared and answered. The answer of appellant stated that he was not informed as to the title of the applicant, and alleged that the lot was delinquent for the general taxes of 1896; that judgment was entered against it; that he purchased it at a tax sale, and, after setting out the various steps to entitle him to a tax deed, averred that such deed was delivered to him and recorded, and that he paid subsequent taxes on the lot and had title in fee simple thereto. The application was referred to the examiner of titles, who proceeded to hear the evidence and prepared his report, finding that the applicant was the owner in fee simple of the lot; that it was not

occupied but was in the possession of the applicant, and that the tax deed of appellant and a quit-claim deed from him to Emma J. Glos were void and of no effect. Appellant objected to the findings, and, his objections being overruled, they were allowed to stand as exceptions in the circuit court. The exceptions were overruled by the court, the report was approved and a decree was entered finding the applicant to be the owner in fee simple of the lot subject to said trust deed, and that the tax deed was void, and confirming title in the applicant in fee simple upon payment to the appellant and Emma J. Glos of the amount due them for taxes, costs and interest.

On the hearing before the examiner the applicant offered in evidence an abstract of title and also a book of abstracts, both of which were objected to by appellant. According to the report of the examiner, he stated, in reply to the objections, that the abstract was good for the purpose of satisfying him as to the applicant's title but not as proof of title against the objection of appellant, and that the book of abstracts was the property of the recorder of deeds, and the reference was made to him as examiner in order that he might have at his disposal the public records in the office of the recorder, and he would let the books go in subject to the objection. There was no evidence whatever to authorize the admission of abstracts or a book of abstracts in evidence. There was no evidence that the original deeds which appeared in the alleged abstract were lost or destroyed or that the abstract book was on file in the office of the recorder. The book was not identified in any way, and there was nothing to show that it was a public record, if it would have been admissible when so proved. The act for registering title may be of a progressive nature, but not to the extent of abrogating rules of evidence and permitting the introduction of abstracts without proper foundation being laid. (*Glos v. Hollowell*, 190 Ill. 65.) But we understand that in the end the abstract and book of abstracts

were not admitted in evidence,—at least they were not considered by the court. Appellant made a motion to strike from the files the abstracts referred to in the examiner's report, and the court denied the motion, with a finding that no abstracts of title or record of abstracts of title had been considered by the examiner or made a part of his report, and that none were presented to or considered by the court.

Leaving out the abstracts, the only evidence of title offered or received was a warranty deed dated March 1, 1897, from Julius Jeske, and Pauline, his wife, to the applicant, subject to the trust deed, together with testimony of applicant's husband tending to show possession of the lot by applicant. There was no evidence tending to show title in Jeske, and appellant insists that the decree was erroneous because it found fee simple title in the applicant without proof that she had such title. The purpose of the act is to establish the title and give certainty to it, so that the public, or any one dealing with the land, may ascertain the true state of the title by inspection of the register. By the act all persons are to be deemed defendants by the designation of "all whom it may concern," and the decree, with certain limitations, is to be forever binding and conclusive upon the whole world. It was not the design of the act that a mere *prima facie* title should be registered as an absolute title in fee simple, and to entitle an owner to registration with such a title it should be proved. The applicant for initial registration of title in fee simple asserts that he is the owner of such title as against all the world and undertakes to establish it, and not merely such a title as would be sufficient to remove a tax deed as a cloud. The court could not order registration of title in fee simple in the applicant in this case without removing the tax deed which was alleged to be a cloud upon such title, but the court could not remove the cloud and then dismiss the petition for failure to prove the title alleged.

The proof must warrant the registration of the title to enable the court to grant the incidental relief of removing a cloud. The act was not intended to substitute a new proceeding for a bill in equity to remove a cloud, and accordingly we have decided in the case of *Glos v. Kingman & Co.* (*ante*, p. 26,) that where the proof does not authorize the registration of title the application should be dismissed.

The decree is reversed and the cause remanded.

*Reversed and remanded.*

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HENRY H. GAGE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.

*Opinion filed December 16, 1903—Rehearing denied February 16, 1904.*

This case is controlled by the decision in *Gage v. People*, (*ante*, p. 61.)

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD, and WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, of counsel,) for appellee.

PER CURIAM: The questions involved in this case are the same as the questions decided in the case of *Gage v. People ex rel.* (*ante*, p. 61.) The decision in that case governs and controls the decision in this case.

The judgment of the county court will be reversed and the cause remanded, with directions to that court to enter a judgment in compliance with section 191 of chapter 120 of Hurd's Statutes of 1901.

*Reversed and remanded, with directions.*

THOMAS J. RYAN

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.*Opinion filed December 16, 1903.*

This case is controlled by the decision in *Gage v. People ex rel.* (*ante*, p. 61.)

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

WILLIAM J. DONLIN, and CHARLES D. RICHARDS, for appellant.

ROBERT REDFIELD, and WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, of counsel,) for appellee.

Per CURIAM: This is an appeal from a judgment of sale rendered by the county court of Cook county upon a delinquent assessment levied by the city of Chicago to defray the cost of constructing a sewer in West One Hundred and Twentieth street, in said city. The lands of the appellant were returned delinquent for a failure to pay the assessment, and the relator applied for judgment of sale at the July term, 1903, of said court. The appellant appeared and filed objections to the application, which were overruled and judgment of sale rendered.

The only ground of reversal insisted upon on this appeal is, that the court below refused to admit evidence for the purpose of showing that the engineer's estimate of the cost of the improvement was not made a part of the record of the preliminary resolution of the board of local improvements. The evidence was objected to by the relator upon the ground that it was incompetent upon this application.

The case is, in respect to this matter, like that of *Gage v. People ex rel.* (*ante*, p. 61,) in which we sustained the contention of counsel for the relator, holding that

the objection was one which could have been made upon the application for judgment confirming the assessment, but was not available in the collateral proceeding for a judgment and order of sale for delinquent taxes. For the reasons given in the opinion in that case, and upon the authorities there cited, this judgment must be affirmed.

*Judgment affirmed.*

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WILLIAM A. DOYLE *et al.*

*v.*

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.

*Opinion filed December 16, 1903—Rehearing denied February 16, 1904.*

**SPECIAL ASSESSMENTS**—*effect of anti-alien labor clause in specifications.* The presence in the specifications for a public improvement of a clause prohibiting the employment of alien labor does not invalidate the special assessment, on application for a judgment of sale, unless the objector can show that such provision in some way actually entered into the competitive bidding. (*McChesney v. People*, 200 Ill. 146, followed.)

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

GEORGE W. WILBUR, for appellants.

ROBERT REDFIELD, and WILLIAM M. PINDELL, (EDGAR BRONSON TOLMAN, of counsel,) for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an appeal from a judgment of sale entered on August 3, 1903, in the county court of Cook county, for the first installment of a special assessment for paving VanBuren street from Paulina street to Kedzie avenue, in the city of Chicago.

It is urged on behalf of the appellants that the court erred in not admitting in evidence the record of the first resolution of the board of local improvements originating this improvement, which was offered for the purpose

of showing that it did not contain an itemized estimate of the cost of the proposed improvement, as required by the law. The record in this case, so far as this matter is concerned, is in precisely the same condition as the record in the case of *Gage v. People ex rel.* (*ante*, p. 61,) appealed from a judgment entered on the same day in the same county court as is the case before us. In that case the appellant made precisely the same point in this regard as is made by appellants in the case now before us, and in considering this point we have availed ourselves of the briefs filed in both cases, and we have in the *Gage case* fully stated our reasons for holding the offered evidence to have been properly excluded. It is unnecessary to repeat those reasons here.

The specifications providing for the improvement involved in the case at bar contain this provision: "It is hereby understood and agreed that said contractor or contractors shall not employ, nor permit to be employed by his or their sub-contractors, any person or persons other than native born or naturalized citizens of the United States." In the advertisement for bids and in the proposal of the successful bidder, reference was made to these specifications, and in the proposal it was stated that it was in accordance with such specifications, and a copy of such specifications was appended to the contract and made a part thereof. For the apparent purpose of showing that this provision restricted competition among possible bidders or actually entered into the competition in some way, appellants took the testimony of two witnesses, John A. May and Joseph Downey. May testified that he had been superintendent of special assessments of the city of Chicago continuously since January, 1899, and that he was, at the time of testifying, a member of the board of local improvements of that city; that the specifications used were partly written and partly printed; that the printed part was a printed blank of a kind which had been used by the city for several years

on which to prepare specifications for improvements of this character; that in the printed part of these specifications was contained this alien labor clause and also a clause providing that men employed in making the improvement should not work more than eight hours per day, which is commonly known as the eight-hour clause; that in preparing specifications for this improvement the eight-hour clause was stricken out, and that the alien labor clause was left in the specifications by an error or oversight of the engineer, the purpose being to strike out both clauses because of a reference to them made by this court. The witness further stated that this so-called alien labor clause had never been in any way enforced by the city, although it had been found in the specifications for many improvements; that it had been absolutely ignored by the city, and that this fact was known generally among contractors engaged in constructing local improvements in the city of Chicago. It appeared from the testimony of Joseph Downey that he had been commissioner of public works of the city of Chicago, and, as such, was at the head of the improvements department of the city, and had been engaged in the business of contracting for public improvements other than street paving. He stated that in his judgment if the alien labor clause was enforced the cost of making the improvement would be somewhat increased; that he did not know whether in contracts of this character the alien labor clause had any effect upon the bidding. On the part of appellee the testimony of a number of witnesses engaged in the business of street paving, by contract, in the city of Chicago, was taken, and this testimony shows that shortly after this alien labor clause first appeared in specifications used by the city of Chicago for the construction of local improvements, which was about 1896, the matter was discussed at a meeting of a number of contractors, at which Mr. Moody, then deputy commissioner of public works of the city of Chicago, was present;

that the conclusion there reached was, that the provision was one which could not be enforced; that similar provisions had been found in specifications for local improvements made by the city of Chicago from that time down to the present, but had never been enforced, and had been uniformly disregarded both by the city and the contractors, and were not taken into consideration by the contractors in bidding for the contracts for constructing local improvements, and that the amount of such bids would be the same, under existing circumstances, whether such provision was contained in the specifications or not.

Upon consideration of all the testimony offered on this subject, we are of opinion that the objector failed to show that this provision entered into the competition for the contract in any way, and following the reasoning adopted by us in *Gage v. People ex rel. supra*, we therefore hold that the provision was not the basis for a meritorious objection.

Appellants regard this contract as obnoxious to public policy on account of this provision, and have referred us to a number of authorities where courts of last resort have refused to enforce contracts for the construction of local improvements which were being made by special assessment, for the reason that such contracts were invalid, either because they contained some provision that was against public policy, or because the law had not been strictly followed by the city in taking the steps preliminary to the execution of the contract itself. We do not consider these cases as of importance in this litigation, for the reason, among others, that we regard ourselves committed by the case of *McChesney v. People*, 200 Ill. 146, to the doctrine there announced, which we have followed in *Gage v. People, supra*, and which leads us to the conclusion on the question here presented which we have above stated.

The judgment of the county court of Cook county will be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* R. M. Sullivan, County Collector,  
v.  
WILLIAM L. FLORVILLE.

*Opinion filed December 16, 1903—Rehearing denied February 4, 1904.*

1. MUNICIPAL CORPORATIONS—the method for levying taxes must be strictly followed. The provisions of the statute prescribing methods by which a city may levy taxes are for the benefit and protection of the tax-payers, and must be strictly followed.

2. SAME—appropriation ordinance not in force until after publication. Under section 3 of article 5 of the City and Village act the appropriation ordinance required by section 2 of article 7 of the same act is not in force until ten days after its publication.

3. SAME—tax levy ordinance passed before appropriation ordinance is in force is void. A tax levy ordinance passed after the appropriation ordinance is passed and signed, but before it has been published, is void.

4. SAME—appropriation for library purposes is governed by the law applying to general appropriations. An appropriation by a city for library purposes must be included in the general appropriation bill and the tax levied therefor as other taxes, and hence is governed by the law with reference to general appropriations.

5. SAME—when amendment to appropriation ordinance is void. An additional appropriation ordinance passed by a city as an amendment to the general appropriation ordinance is without authority and an additional tax levy ordinance based thereon is void, where the proposition to make such appropriation was not sanctioned by the voters of the city, as required by section 2 of article 7 of the City and Village act.

APPEAL from the County Court of Sangamon county;  
the Hon. GEORGE W. MURRAY, Judge, presiding.

ALBERT SALZENSTEIN, and ARTHUR FITZGERALD, for  
appellant:

No error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the tax, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof. Hurd's Stat. 1901, chap. 120, sec. 191, p. 1476; *Buck v. People*, 78 Ill. 560; *Moore v. Fessenbeck*, 88 id. 422; *Railroad Co. v. Surrell*, id. 535; *Rail-*

*road Co. v. People*, 171 id. 250; *Railroad Co. v. People*, 183 id. 247; *Railroad Co. v. People*, 190 id. 20.

An ordinance becomes a law after its passage by the city council and approval by the mayor, even though it does not go into effect until after publication. Hurd's Stat. 1901, chap. 24, art. 3, sec. 18, p. 282; *People v. Inglis*, 161 Ill. 256; *Guild v. Chicago*, 82 id. 472; *People v. Reynolds*, 5 Gilm. 12; *Rodhouse v. Johnson*, 57 Ill. App. 73; *Standard v. Industry*, 55 id. 523; *King v. Chicago*, 111 Ill. 63; *Stuhr v. Hoboken*, 47 N. J. L. 147.

An *obiter dictum* is an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication. 1 Bouvier's Law Dic. 476; 9 Am. & Eng. Ency. of Law, (2d ed.) 452; *Carrol v. Carrol*, 16 How. 275; *Cohen v. Virginia*, 6 Wheat. 399; *Mayer v. Ehrhardt*, 88 Ill. 452; *Frantz v. Brown*, 17 S. & R. 292.

What was said about a prior publication of an appropriation ordinance to make a tax levying ordinance valid, in the opinion in the case of *People v. Railroad Co.* 116 Ill. 410, was not necessarily involved in that case, and is not binding upon this court.

The library tax and tax for payment of first installment of purchase price of new library site did not require a prior publication of an appropriation ordinance. *Railroad Co. v. People*, 200 Ill. 623; Library act, secs. 1, 13.

CHARLES P. KANE, and SCHOLES & BARBER, for appellee:

An appropriation ordinance must be passed during the first fiscal quarter, which shall specify the amounts of the several appropriations. Hurd's Stat. 1899, chap. 24, sec. 89.

Such appropriation ordinance must be published within one month after its passage, in a newspaper published in said city, or by posting, as the case may be, and shall not take effect until ten days after such publication. Hurd's Stat. 1899, chap. 24, sec. 64.

After the expiration of ten days, and on or before the third Tuesday in September, a second ordinance must be passed, levying the amount of such appropriations. A certified copy of the latter ordinance must be filed with the county clerk. Hurd's Stat. 1899, chap. 24, p. 111.

No valid tax levying ordinance can be passed except to levy and assess appropriations that before such passage have been legally made, to defray the expenses and liabilities of the corporation. Two steps are necessary in order that such appropriations may be legally made: First, the passage of an ordinance determining the amount of such appropriations; and second, the publication of such ordinance as required by law, for a full period of ten days. Any levy or assessment attempted before the ten days of publication have elapsed is premature, without legal authority, and void, for no ordinance making an appropriation can take effect until ten days after its publication. Hurd's Stat. 1899, chap. 24, sec. 64.

PHILIP B. WARREN, H. L. CHILD, and SHUTT & GRAHAM, (BLUFORD WILSON, of counsel,) also for appellee:

Provisions of the statute designed for the protection of the tax-payer are mandatory, and a disregard of them will render the tax illegal. *Railway Co. v. People*, 193 Ill. 594; *Vieley v. Thompson*, 44 id. 9; *People v. Railroad Co.* 116 id. 410; *Riverside Co. v. Howell*, 113 id. 256; *People v. Smith*, 149 id. 549.

The statute requiring publication of an appropriation ordinance, and that it should not take effect until ten days after it is so published, was designed for the protection of the tax-payer. *People v. Railroad Co.* 116 Ill. 410; *Cairo v. Campbell*, id. 305; *Riverside Co. v. Howell*, 113 id. 256.

Appropriations have not been legally made until ten days have elapsed after publication of an appropriation ordinance properly passed. *Riverside Co. v. Howell*, 113 Ill. 256; *People v. Railroad Co.* 116 id. 410; *Cairo v. Campbell*, id. 305; *Barnett v. Newark*, 28 id. 62.

A city council has no power to levy until there have been appropriations legally made upon which to base such levy. *Riverside Co. v. Howell*, 113 Ill. 256; *People v. Railroad Co.* 116 id. 410; *Cairo v. Campbell*, id. 305; *Mix v. People*, 106 id. 425.

The substantial justice of the tax is affected if it is one which the authorities attempting to impose it have no power to impose. *Railway Co. v. People*, 193 Ill. 594.

Section 191 of the Revenue act does not cure defects which affect the substantial justice of the tax. *Railway Co. v. People*, 193 Ill. 594.

Where the taxing authorities had no power to levy at the time they attempted to levy, the tax is void and an injunction will lie to restrain its collection. *Kochersperger v. Larned*, 172 Ill. 86; *Vieley v. Thompson*, 44 id. 9; *Railroad Co. v. Hodges*, 113 id. 323; *Drummer v. Cox*, 165 id. 648; *Briscoe v. Allison*, 43 id. 291.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This was an application made at the June term, 1903, of the county court of Sangamon county, by the county collector of that county, for judgment against delinquent lands and lots in said county for the year 1902. Appellee filed objections to the rendition of judgment against his property for the corporation taxes of the city of Springfield. The county court sustained the objections and refused judgment against his property as to the taxes objected to, and thereupon this appeal was taken by the People.

The city of Springfield is organized under the general law, and its fiscal year begins March 1. On March 3, 1902, its city council passed an annual appropriation bill or ordinance, appropriating for the various items of city government and expenses the sum of \$271.914, and also \$8000 for library expenses, and \$6000 in payment of the first installment on library site. After this ordinance was passed it was signed by the mayor, and immediately

after its passage, on the same night, the city council passed a tax levy ordinance, levying for city government and expenses the sum of \$133,511, together with the \$8000 for library expenses and \$6000 for library site. The appropriation ordinance, as passed, was published for the first time on March 5, 1902, and thus became in full force and effect on March 15, 1902. On March 17, 1902, the city clerk of the city of Springfield filed with the county clerk of Sangamon county a certified copy of said tax levy ordinance, as provided by statute. On August 11, 1902, the city council passed an amendment to the appropriation ordinance of March, appropriating the sum of \$7000 for the purpose of re-building the town branch sewer, and on September 8, 1902, an amendment to the tax levy ordinance, levying the sum of \$7000 as a special sewer fund for the purpose of re-building the town branch sewer. This amendment to the tax levy ordinance was also duly certified by the city clerk to the county clerk. The county clerk duly extended all of the taxes, as above levied, against the property of appellee, but when they became due and payable he refused to pay the same, and upon this application of the county collector for judgment filed his objections to said taxes, which, as stated above, were sustained by the court and this appeal was prayed.

The first objection made by appellee is to the appropriation ordinance and tax levy passed on March 3, 1902. His objection is, that at the time of the passage of said tax levy ordinance there was no appropriation ordinance in full force and effect, as the one passed March 3 had not been published at that time as required by statute, and that this was a condition precedent, and therefore the tax levy ordinance was void. The validity of this objection must depend upon the construction of paragraphs 64, 89 and 111 of chapter 24 of our statutes. (Hurd's Stat. 1899, pp. 279, 282, 286.) Paragraph 89 provides that the city council "shall, within the first quarter

of each fiscal year, pass an ordinance, to be termed the 'annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation." Paragraph 111 provides that the city council "shall, annually, on or before the third Tuesday in September in each year, ascertain the total amount of appropriations for all corporate purposes *legally made* and to be collected from the tax levy of that fiscal year; and, by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose, respectively, levy the amount so ascertained upon all of the property subject to taxation within" said city. Paragraph 64 provides that "all ordinances of cities \* \* \* making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in the city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; *and no such ordinance shall take effect until ten days after it is so published.*"

The construction of these three paragraphs has been before this court in other cases, and while the facts were not exactly similar in those cases to the one at bar, yet the decisions therein, we think, give the proper interpretation or construction of said three paragraphs. In the case of *Riverside Co. v. Howell*, 113 Ill. 256, it was said, (p. 261,) speaking of paragraphs 89 and 111: "It will thus be seen that there is here, in the interest of the tax-payer, most careful provision made against extravagance of expenditure and abuse of the power of taxation. There is to be passed within the first quarter of each fiscal year the annual appropriation bill, wherein is to be appropriated such money as may be deemed necessary for all expenses and liabilities of the corporation, specifying the objects and purposes of the appropriations and

the amount for each object and purpose, which is to be published. \* \* \* The power given to the city council to levy taxes is with a restriction as to the manner in which the power is to be exercised,—that the city council shall ascertain the total amount of appropriations legally made, and by ordinance levy and assess such amount so ascertained. The act requires the annual appropriations to be first made within the first quarter of the fiscal year and their amount to be ascertained, and then that the levy and assessment should be made, by ordinance, for the amount. These requirements of the statute we regard as for the protection of the citizen, and not directory, but mandatory. The power of the taxing authority in such a case is limited by the manner and conditions prescribed for its exercise. \* \* \* We view the requisite of the appropriation ordinance as a limitation upon the power of the city council to levy the tax. The failure to pass such ordinance is not a mere formal defect, and so is not cured by section 191 of the Revenue law. \* \* \* The want of an appropriation ordinance we look upon as a defect in the proceedings which makes the city tax illegal,—which surely affects the substantial justice of the tax."

In the case of *People ex rel. v. Peoria, Decatur and Evansville Railroad Co.* 116 Ill. 410, it was again held (p. 414): "The law certainly contemplated the passage of two separate ordinances at different times. Section 111 directs the city council to ascertain 'the total amount of appropriations for all corporate purposes *legally made.*' The appropriations which they are to ascertain are those which have been already legally made at the time they are required to ascertain the total amount of them. This imports and implies a previous making of such appropriation in a lawful way. Section 64 of the City Incorporation act provides that all ordinances of cities and villages 'making any appropriation' shall, within one month after they are passed, be published, \* \* \* and

no such ordinance shall take effect until ten days after it is so published. Hence the appropriation ordinance required by section 89 \* \* \* does not take effect until ten days after it is published. Until that time has passed the appropriations which it specifies do not become legal and valid and cannot be said to have been legally made. \* \* \* The publication of the appropriation ordinance and the delay of ten days before its going into effect were intended to give tax-payers notice of its provisions, and in many cases might lead to changes in the amounts specified before final adoption. In such event, any steps taken for the levying of the tax before the expiration of the ten days would be premature."

It is insisted, however, by appellant, that a part of these decisions is mere *dictum*, and not necessary to a proper consideration and decision of the case in hand. Even if this be true, yet we are of the opinion that the decisions lay down the correct rule with reference to the requirements of said section. Judge Cooley, in his work on Taxation, (2d ed. 276,) says: "Where the power is found to have been conferred upon municipal corporations to levy a tax, if any question arises upon its extent or application the rule is that the power must be strictly construed. Municipal authorities, therefore, when they assume to tax, must be able to show warrant thereunder in the words of the grant, which alone can justify their action. They are to assume that they can tax only as the State in its wisdom has thought proper to permit."

A method is provided by statute by which the city council may levy its taxes. This method is clearly laid down in the statute, and it is the duty of the city council to follow it strictly. These provisions are made for the benefit and protection of the tax-payers. If no appropriation ordinance had been passed at all, or if it were fatally defective in any of its provisions or in the method of its passage, there can be no question but that a tax levy ordinance following it would be void, and we are of

the opinion that the same result must be reached here. At the date of the passage of the tax levy ordinance the appropriation ordinance had been passed and signed, but it had not been published and was not in full force and effect. In other words, the amount of tax necessary for the corporate purposes had not been legally ascertained. This appropriation ordinance was not in full force and effect until March 15, 1902, or twelve days after the passage of the said tax levy ordinance, and as no subsequent tax levy ordinance was passed after said appropriation ordinance took effect, by means of which said tax levy ordinance of March 3, 1902, was ratified and confirmed, we are forced to the conclusion that said tax levy ordinance was void. We have carefully considered the question whether it might not be held that the appropriation ordinance, after being duly published, would relate back to the date of its passage and approval, but have been unable to find authority for the position, and it seems diametrically opposed to our previous decisions above cited.

It is contended, however, by appellant, that the appropriations for library purposes are not governed by the law with reference to general appropriations, and sections 1 and 13 of the Library act are cited in support of the contention. A careful examination of these sections will show that the construction insisted upon is not warranted. Section 13 expressly provides that the appropriation for library purposes shall be included by the city council in its appropriation bill, and section 1 provides that said tax shall be levied as other taxes for city purposes. We are of the opinion that the county court properly sustained the objections to that tax also.

The second objection made by the appellee is to the amendment to the appropriation ordinance made on August 11, 1902, and the tax levy ordinance passed on September 8, 1902, in pursuance thereof. He insists said tax levy ordinance was void because the city had no power,

on August 11, 1902, to pass an appropriation ordinance. Paragraph 89 of chapter 24 provides that after the appropriation ordinance has been made during the first quarter of the fiscal year no further appropriations shall be made at any other time within such fiscal year, unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them or at a general or special election duly called therefor. There is no claim in this case that the appropriation as made on August 11, 1902, was sanctioned by a majority of the legal voters of said city in either of the modes pointed out by the statute. As this appropriation was not made during the first quarter of the fiscal year, we are of the opinion that under the foregoing section the city had no power to pass the amended appropriation ordinance or tax levy ordinance, and therefore both were void, and the county court committed no error in sustaining that objection.

For the reasons given, the order of the county court sustaining said objections will be affirmed.

*Judgment affirmed.*

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THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

ELLEN V. HATTER.

*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*when appeal in trespass is properly taken to Supreme Court as involving freehold.* Where a declaration in trespass alleges that the plaintiff has been in adverse possession of the premises for more than twenty years, and the defendant files the general issue and a special plea of *liberum tenementum*, to which a replication concluding to the country is filed, the ownership of the freehold is involved and a direct appeal lies to the Supreme Court.

2. LIMITATIONS—*mere possession does not satisfy the requirements of the statute.* Possession such as is contemplated by the Statute of Limitations must be adverse, actual, visible, exclusive, continuous and under a claim of ownership.

3. SAME—*what does not tend to show claim of title.* The fact that an agent, in constructing a fence without the knowledge of his principal, assumed that the latter was claiming title to the strip of land enclosed does not tend to show such claim.

4. SAME—*effect where tenant of grantor is in actual possession.* The fact that a tenant of the grantor is in actual possession of a strip of land not included in the terms of the deed is simply a circumstance to be considered by the jury in determining whether possession of such strip was actually delivered by grantor to grantee.

5. SAME—*when possession of grantor cannot be tacked to possession of the grantee.* Where a strip of land is not included in the deed, the grantor's possession thereof cannot be tacked to the possession of the grantee, unless such possession was actually delivered by the former to the latter.

APPEAL from the Circuit Court of JoDaviess county; the Hon. R. S. FARRAND, Judge, presiding.

This is an action of trespass *quare clausum fregit*, brought by appellee, against appellant, in the circuit court of JoDaviess county, to the February term, 1902, of that court. The declaration consisted of one count, alleging title, by adverse possession, to a strip of land adjoining appellant's depot platform in the city of Galena, and charging appellant with tearing down a fence and chopping down a large shade tree on such strip, throwing both on adjoining land of appellee, and erecting on the strip a tight-board fence, without permission from appellee. Appellant filed a plea of not guilty and a plea of *liberum tenementum*. The cause was tried before a jury and a verdict of \$650 rendered. Appellee remitted \$350 of this amount, and after overruling motions for a new trial and in arrest of judgment the court entered judgment for \$300 in favor of appellee. The appeal is directly from that judgment to this court.

Ellen V. Hatter, the appellee, lives in Galena, Illinois, immediately adjoining the Illinois Central depot. The depot is located on a lot north of the building occupied by Mrs. Hatter. West of this depot and of the property of appellee, and extending the entire distance along the west end of appellee's property, is a platform belong-

ing to the railroad company. Between the property of appellee and the platform, and south of appellee's house, there was, prior to the trespass complained of, a picket fence, which enclosed appellee's property on the west side, south of her house. This fence was about 5.2 feet east of the outer edge of the platform at its south end and 5.8 feet at the north end. East of this fence, and within the right of way, was an elm tree, which shaded the porch of appellee. About December 9, 1901, the servants of appellant, without permission from appellee and against her protests, removed this fence, cut down the elm tree and erected a board fence, the south end of which is about twelve feet from the platform and the north end fourteen feet, and just within the line of the right of way as conveyed by Mrs. Wight.

Appellant, on March 13, 1854, obtained a deed from Lucy N. Wight, conveying to it, with other property, this strip of land, which was part of its right of way, and appellant claims that it was exercising its right in doing the acts complained of. Appellee purchased the property occupied by her from M. L. Johnson in 1896. Johnson had obtained a deed for the same property from Lucy N. Wight in 1894. Both of these latter deeds conveyed only property east of the right of way of the railroad.

About 1854 a railing was placed along the east side of the platform by the railroad company, and in 1866 or 1867 the fence on the south side of appellee's property and the fence immediately south of her house were each continued west until they connected with this railing, so that the railing constituted the west enclosure for the property. This railing was removed at some later period, just when does not appear from the record. Some time about the year 1880, and probably previous thereto, Johnson, who was in charge of Mrs. Wight's business and who was her agent, erected a fence about five feet east from the platform and almost parallel therewith, as he testified, so that persons on the platform could not sit

on the fence and whittle it. He further testified that the improvements and possession of the strip in dispute were continuous for thirty-five years that he remembered of, and that no other person exercised any ownership over it during that period. Other testimony shows that there was a low place near the platform, partly on this strip but principally on the adjoining land, and that appellee, Johnson and Mrs. Wight had caused earth to be hauled and used in filling the low place almost to the fence which was removed by appellant, and that the agent for the company saw this work being done and made no objection, and that appellant had used this hole as a dumping place for cinders. It also appeared that appellee had cultivated the tract of land in dispute during the last few years, and had raised vegetables thereon.

W. J. KNIGHT, and W. T. HODSON, (J. M. DICKINSON, of counsel,) for appellant.

SHEEAN & SHEEAN, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

It is suggested by appellee that this appeal should have been taken to the Appellate Court, and it is said that the suit is for an injury to the possession; that it is a possessory action brought for a trespass *vi et armis*; and it is argued that having been in possession, the plaintiff is entitled to recover for the injury to the possession even though the defendant was the owner of the freehold and entitled to the possession, and appellee asserts that this is an action of trespass *vi et armis*—not of trespass *quare clausum fregit*. The latter is the technical name of that form of trespass *vi et armis* which is brought for violent or forcible injury to real property. (21 Ency. of Pl. & Pr. p. 786.) The pleader in this instance seems to have followed the form given by Puterbaugh's Common Law Pleading and Practice at page 577, (third edition,) for a declaration in trespass *quare clausum fregit*, except

that instead of averring, in so many words, that the plaintiff is the owner of the premises, it is alleged that she and her grantor have been in the adverse possession thereof for more than twenty years, from which it would appear that the claims of all other persons thereto had been barred. It is evident that the action is for trespass *quare clausum*.

The defendant interposed the general issue and a special plea, *liberum tenementum*. To the latter plaintiff filed a replication concluding to the country. This special plea presented a perfect defense to the action, and the appeal was properly taken from the circuit court to this court, one question in the case being, who is the owner of the freehold to which the trespass is alleged to have been committed? *Piper v. Connelly*, 108 Ill. 646.

On this phase of the litigation, appellee places great reliance on the case of *Illinois and St. Louis Railroad and Coal Co. v. Cobb*, 68 Ill. 53. In that case the only plea was the general issue, and the court there calls attention to the fact that "the defendant did not seek to show any proper title to the premises."

On March 13, 1854, Lucy N. Wight, then the owner of lots 2 and 3 in block 5, in the city of Galena, conveyed to appellant a right of way through these lots. This right of way runs in a northerly and southerly direction. The passenger depot of appellant is on the lot next north, and the passenger platform, built some time about 1854, extends south on the east side of the railroad tracks entirely across lots 2 and 3. The east edge of this platform, where it crossed lots 2 and 3, was about fourteen feet inside the east line of the right of way. A railing was built by the company along the east edge of this platform from about the middle of lot 2 south to a point near the south line of lot 3, for the apparent purpose of preventing passengers or others upon the platform stepping or falling off the east edge of the platform, there being a descent of about two feet there to the ground.

About 1866 Mrs. Wight, being still the owner of that portion of lots 2 and 3 lying east of the right of way, fenced the same. She did not, however, put a fence along the line of the right of way on the east side of the platform, but, instead, joined her fences to the ends of the guard rail above mentioned, thus including in her enclosure the strip fourteen feet in width, and extending from the place where her fence joined the guard rail on the north to the place where her fence joined it on the south. She made no further conveyance affecting her title to lots 2 and 3 until July 13, 1894, when she conveyed her title therein to Madison L. Johnson, her grandson. Prior to this last mentioned conveyance Johnson had been acting as her agent, and in 1880 he constructed a fence about five feet east of the guard rail and practically parallel therewith, which left an unenclosed strip of that width between the platform and the new fence, and this fence remained on that line until the time of the occurrences which occasioned this suit.

At the time Mrs. Wight's fences were joined to the guard rail there was a hole or depression several feet in depth, beginning about five feet east of the platform and extending further east. This depression was circular in form and its extent is uncertain from the evidence, the testimony of one witness fixing its diameter at about fifteen feet and that of another at about forty feet. In any event, its greater extent was east of the right of way. This was so low that it frequently contained stagnant water. The health officers complained about it. Mrs. Wight, through her agent, caused earth to be put in it and the defendant made it a dumping place for cinders.

Appellee, on the trial, sought to show a title by adverse possession to this strip in herself by tacking the possession of Mrs. Wight, Madison L. Johnson and herself. We are of the opinion that the testimony fails to show the possession of Mrs. Wight to have been under a claim or color of title. At the time she fenced up to the

guard rail she had but recently conveyed the right of way to the company, and it is probable that she joined her fences to the guard rail as a matter of convenience, and because of the inconvenience of fencing through the hole on the line of the right of way. It does not seem that she would at that time set up a claim of ownership to this strip of ground which she must have known she herself had deeded to the appellant. Her acts, or those of her agents, in causing the depression to be filled are without significance. The greater amount of the filling was done on her side of the right of way line. The company assisted in the filling by throwing cinders there. The fact that she may have done more than her proportion of this work, if that be the fact, does not warrant the conclusion that she was claiming the strip of land then belonging to the appellant. It does not appear that she had any knowledge of the building of the fence, in 1880, by Madison L. Johnson at all. He says he built it where he did without regard to where the line was, because the guard rail was constantly being broken down, and he wanted the fence back from the platform where persons upon the platform would not be apt to destroy it. Except for these acts of the agents and employees of Mrs. Wight the record contains no evidence in reference to what she claimed about the ownership of this strip except that of Madison L. Johnson, who, in response to leading interrogatories propounded by counsel for appellee, testified on her behalf as follows:

Q. "Did Mrs. Wight claim up to the platform?"

A. "Well, I don't know as she ever got out.

Q. "Well, you acted for her?"

A. "Yes; I assumed we claimed it; yes sir."

It is apparent that Johnson did not know what his grandmother claimed. His assumption that she claimed title would not constitute a claim of title by her, and the testimony does not show that he was her agent for the purpose of determining whether she owned this strip or

for the purpose of making any claim in reference thereto. Johnson's testimony, in connection with the evidence of possession and filling the depression, is all the proof in the record from which any argument that Mrs. Wight claimed to own this strip can be deduced. It is not sufficient to sustain a verdict finding that her possession was adverse to appellant and under a claim of right. At most, it shows nothing more than possession. This is not enough. The evidence must go further and show that the possession was (1) hostile or adverse; (2) actual; (3) visible, notorious and exclusive; (4) continuous; and (5) under a claim of ownership. (*Zirngibl v. Calumet Dock Co.* 157 Ill. 430.) There is no evidence in this record showing that the possession of Mrs. Wight satisfied the fifth element, and as twenty years had not elapsed subsequent to the execution of her deed to Johnson, there was no evidence upon which the jury could rightfully find the title to this strip to be in appellee. Consequently there was no evidence upon which to base the fourth and fifth instructions given on the part of appellee, which submitted to the jury the question whether she had title by twenty years' adverse possession to this fourteen-foot strip.

Under the issues in this case, and in the absence of proof of twenty years' adverse possession, the second instruction given on appellee's part is also erroneous in so far as it permits the jury to award damages for the acts of the defendant in going upon this strip of land and doing the things it did upon that strip.

This record presents no defense whatever to the act of the railroad company in throwing the old fence and the shade tree on the land of Mrs. Hatter lying east of the boundary of the right of way, but there is no method by which this court can separate the damages allowed by the jury for that trespass, if any, from those which they have apparently allowed for a trespass to the fourteen-foot strip.

As the case must be submitted to another jury, we have examined the instructions refused which were offered by appellant. We think, so far as they stated correct principles of law, the subject matter thereof was fully covered by instructions given, except those stating the doctrine of tacking possession. Appellant was entitled to have the jury instructed that if the fourteen-foot strip in question was not conveyed by deed to Johnson and by deed from him to Mrs. Hatter, then the possession of Johnson and the possession of Mrs. Wight could not be tacked upon the possession of Mrs. Hatter, unless Mrs. Wight delivered to Johnson and Johnson delivered to Mrs. Hatter the possession of this strip of land; but the instructions which embodied this proposition also submitted to the jury the question whether, at the time of the delivery of the deeds, respectively, the strip was actually in the possession of a tenant of the grantor. We think this misleading. The jury was apt to conclude therefrom that if the actual possession was in the tenant there could be no delivery of the possession by the grantor to the grantee. This is not the law. The fact that the actual possession was in the tenant was merely a circumstance to be considered by the jury with the other evidence in determining whether or not the possession was delivered.

Complaint is also made that the court allowed counsel for appellee, in his closing argument, to make prejudicial and improper remarks to the jury. We are disposed to think that some of the language pointed out should not have been used, but as it will probably not be repeated on another trial, further discussion thereof would be profitless.

For error in giving the second, fourth and fifth instructions given on the part of the plaintiff below, the judgment is reversed and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. *Reversed and remanded.*

MICHAEL J. CLEARY *et al.*

v.

CHARLES F. HOOBLER *et al.*

*Opinion filed February 17, 1904.*

1. **MANDAMUS**—*facts alleged in petition and not denied by answer are admitted.* A proceeding for *mandamus* is a suit at law, and all facts properly alleged in the petition which are not denied in express terms by the answer are admitted to be true, and averments of the answer merely disclaiming knowledge of the facts alleged in the petition have no effect.

2. **STATUTES**—*intention to give statute retrospective operation must be clearly expressed.* Even in cases where the legislature might lawfully affect existing rights, the intention to give a statute retrospective operation must be clearly manifested, and in case of doubt the act will be construed as having prospective effect, only.

3. **DRAINAGE**—*act authorizing dissolution of district does not apply to districts organized prior to 1885.* The act of 1889, (Laws of 1889, p. 119,) adding section 47½ to the act of 1885 and providing for the dissolution of drainage districts, refers to districts organized under the act of 1885, and not to those organized under prior acts, which were expressly repealed by the act of 1885.

4. **SAME**—*commissioners of district organized under act of 1879 may be compelled to make repairs.* Commissioners of a drainage district organized under the Farm Drainage act of 1879 may be compelled by *mandamus* to levy assessments and make repairs, and are liable to penalties for failure to perform their duties.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

D. D. DONAHUE, and J. J. MORRISSEY, for appellants.

ROWELL, NEVILLE & LINDLEY, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellants filed in the circuit court of McLean county their petition for a writ of *mandamus* directing appellees, as drainage commissioners of district No. 1 in Gridley township, in said county, to levy assessments on the

lands benefited within the said drainage district, for the purpose of repairing and maintaining the main ditch of the district through the lands of petitioners, and to repair and maintain the same so as to carry off the water flowing into it. The defendants answered the petition, setting up as a defense that the district had been dissolved and ceased to exist. Petitioners demurred to the answer generally and specially, and the demurrer being overruled, they elected to stand by it. The court thereupon dismissed their petition and entered judgment against them for costs. The appeal was taken to this court on the ground that the constitutionality of the statute authorizing the dissolution of a district organized before its passage is involved in the litigation.

The petition alleges that drainage district No. 1 in Gridley township, in McLean county, was organized in the year 1884 under an act entitled "An act to provide for the organization of drainage districts and to provide for the construction, maintenance and repair of drains, and ditches, by special assessments on the property benefited thereby," approved May 29, 1879, in force July 1, 1879, (Laws of 1879, p. 142,) and amendments to said act passed in 1881 and 1883; that the petitioner Cleary is the owner of two hundred and forty acres and the petitioner Stokes is the owner of eighty acres in township 26, range 2, in Gridley township and in said district; that the main ditch of the drainage district was constructed over their lands; that a large territory lying south-west, west and north-west, within the district, is drained through the ditch; that the ditch has become filled up by its banks caving in and the clay and other material being washed into it from the lands drained, and the weeds and grass have been permitted to grow in it, so that the ditch is inadequate and insufficient to carry off the water drained into it from said territory; that the waters flowing into the ditch from other lands have during the last two years overflowed the banks and

spread over the lands of petitioners, making them unfit for cultivation and destroying their crops, and that petitioners have made demands on the defendants to levy an assessment and to repair and improve said ditch so as to carry off the water drained into it.

In answering the petition defendants seem to have misapprehended the nature of the suit, and the answer is somewhat after the form of an answer in chancery. The proceeding for *mandamus* is a suit at law, and the rules of pleading are the same as in other suits at law. All the facts properly set forth in the petition which are not denied in express terms by the answer are admitted to be true. (*Chicago and Alton Railroad Co. v. Suffern*, 129 Ill. 274; *People v. Crabb*, 156 id. 155; *Mayor of Roodhouse v. Briggs*, 194 id. 435; 13 Ency. of Pl. & Pr. 734.) The answer admits some of the averments and contains no direct or express denial of any specific fact alleged in the petition, and the facts alleged are therefore admitted. Averments that the defendants do not know whether the proceedings in organizing the district were in due form of law or not; that they do not know under what act of the legislature the district was established, and that they neither admit nor deny the allegations that the district was duly organized, have no effect whatever.

The defense that the district has ceased to exist is founded upon the following allegations of the answer: That the act of 1879, under which the district was organized, was repealed by an act entitled "An act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named," approved June 27, 1885, in force July 1, 1885; (Laws of 1885, p. 78;) that said act of 1885 took the place of the previous act of 1879, and the district continued to exist as a drainage district under the act of 1885; that section 47½ was added to said act of 1885 by an act approved June 3, 1889, in force July 1, 1889, (Laws of 1889, p. 119,) providing for the dissolution of districts organized under said act of 1885, and

that the drainage district was dissolved on August 10, 1895, in pursuance of the provisions of that section, on petition of two-thirds of the owners of land in the district.

The grounds upon which it is claimed that the court erred in overruling the demurrer to the answer are: First, that section 47½, which was added to the act of 1885 by way of amendment in 1889, does not authorize the dissolution of drainage districts organized under the act of 1879; second, that said section is in violation of various provisions of the constitution as applied to districts organized before its passage; and third, that the proceedings for the dissolution of this drainage district are null and void. The second and third of said propositions are fairly involved in the case, but we have not found it necessary to consider any question except the first one, relating to the application of section 47½ to this district.

Generally, statutes are to be treated as establishing rules for the future, and even where the legislature may lawfully limit or affect existing rights, an intention to do so will not be presumed unless it clearly appears. The rule is well established that a retrospective operation of a statute is not favored. Such an intention must be manifested by clear and unequivocal language, and in case of doubt the statute must be construed to have a prospective effect, only. (*Thompson v. Alexander*, 11 Ill. 54; *McHaney v. Trustees of Schools*, 68 id. 140; *Means v. Harrison*, 114 id. 248; *In re Day*, 181 id. 73.) This is a case where that rule ought to be applied if it can be, and the statute should be restricted in its operation to districts organized after its enactment, unless it is clear that the intention of the legislature was otherwise.

The act of 1879 provided for the organization of drainage districts and the construction of ditches by assessments of benefits and damages to the land owners within the district. It contemplated that some lands would be benefited and other lands would be injured; that some

would be both benefited and damaged; that the benefits might exceed the damages or the damages exceed the benefits, and that assessments should be made of damages and benefits, so as to do justice to all the owners within the district. Section 38 provided for maintenance and repair and for future assessments, and was as follows: "All ditches and drains shall, at all times, be kept in good order and repair by the commissioners, and the lands affected by said work shall pay their proportionate amount of costs, which shall be in the same proportion that the lands were originally assessed." Penalties were imposed upon the commissioners for failure to perform the duties imposed upon them by the provisions of the act, and there was no provision for the dissolution of a district, or the release of those benefited from their obligation and the imposition of the entire burden upon those who are injured. This district was organized under that law, which created an obligation to maintain the drains and ditches on petitioners' lands at all times, and the property benefited thereby was liable to be assessed for such maintenance. If the commissioners failed to keep the ditch in repair, the law gave petitioners a remedy, by *mandamus*, to compel them to levy assessments and make repairs, and the commissioners were also liable to penalties for failure to perform duties. If the right of way for the ditch was obtained by agreement it was in view of the provisions of the law with reference to maintenance and repair, and if it was condemned it was upon that basis. To apply the subsequent statute in a retrospective way to a district so organized would be contrary to natural justice, and deny to petitioners a right to have the ditch maintained so as to carry off the water cast upon their lands, as the law provided would be done. The intention to commit such an act of injustice should not be attributed to the legislature if it can be avoided. A construction of the statute which would continue the use of the ditch on petitioners' land for the benefit of other proprie-

tors who are released from their obligation should not be considered within the legislative intent unless such intent is clear, regardless of any constitutional question.

In our opinion the language of the statute does not manifest such an intention, but rather the contrary. The act of 1885 in express terms repealed the act of 1879, under which the drainage district was organized, together with amendments thereto and other acts named in the repealing section. The act of 1885 was not an amendment of previous acts, but was declared to be an amendatory revision and consolidation of the acts repealed, and an independent act, except as it was a codification and amended successor of the first three acts mentioned in the repealing section, which included the act of 1879 and the amendments. The repealing section contained the following provision: "All drainage districts heretofore organized under any one or more of the acts hereby repealed shall be held, and they are hereby declared to be legally organized, and the assessments made therein shall be held to be legally made. \* \* \* The officers, under the repealed act, and proceedings begun, shall be continued under this act, and shall have and possess all the rights, powers and privileges the same and to the same extent as though the whole proceedings were commenced and carried on under the provisions of this act, and only affected as to the future as herein provided." There was no provision in the act of 1885 for the dissolution of a drainage district, but in 1889 the act referred to in the answer was passed, by which section 47½ was added, providing that a drainage district should be dissolved without notice or a hearing, or any adjustment of rights or duties, whenever two-thirds of the owners of land owning two-thirds of the land in the district should sign a petition for the dissolution. It provided that the district should still have the use of the drains, and a person over whose lands a ditch had been constructed should not be allowed to obstruct the use or proper working of

the ditch. The effect of the provision would be to release the lands benefited by the drainage furnished by the ditch from assessments to maintain and keep it in repair, while the owners still have the right to gather the waters on their lands and cast them into the ditch. The operation of the section is limited to drainage districts organized under the act of 1885, the language being, "any drainage district organized under this act." This district was not organized under that act, but under the previous independent act of 1879, which was expressly repealed by the act of 1885. The district was continued as a drainage district under the act of 1885 by virtue of the above provision that all drainage districts previously organized under any one or more of the acts repealed should be continued under the new act. Such districts are nowhere referred to in the act of 1885 as being organized under it, but, on the contrary, are described as districts organized under the acts thereby repealed.

Counsel for appellants say that if land owners were authorized to proceed to obtain a dissolution of the district they should have proceeded under the general act providing for such dissolution in force July 1, 1889, (Laws of 1889, p. 117,) which provides for notice and a hearing, and which was held not in conflict with the constitution in the case of *Hollenbeck v. Detrick*, 162 Ill. 388. The validity of that act was established by that decision, and it applies to all drainage districts, whether organized as this district was or by proceedings in the county court.

It is urged that petitioners are estopped to question the dissolution of the district by delay in bringing their action. It is not contended that they are barred by any statute of limitations, and there is nothing appearing which could amount to an estoppel.

The judgment of the circuit court is reversed and the cause is remanded, with directions to sustain the demurrer to the answer.

*Reversed and remanded.*

JOHN FRED WILENOU

v.

ANNA HANDLON *et al.**Opinion filed February 17, 1904.*

1. DEEDS—*recording of deed not conclusive evidence of absolute delivery.* The recording of a deed by the grantor is not conclusive evidence that he then delivered the deed absolutely or that he intended it to take effect at once.

2. SAME—*what does not show that deed was delivered absolutely.* Evidence that the grantor executed and recorded a deed without the knowledge of the grantees, his adult children, until he brought it home, when he handed it to one of the grantees, telling her to put it with his papers where it would be found after his death, does not show delivery with intention of at once vesting title.

3. SAME—*presumption of delivery to adult child not as strong as in case of minor.* The presumption of delivery of a deed from parent to child, arising from its execution and recording, does not obtain in favor of adult children to the same extent as where the children are minors.

4. SAME—*fact that grantor continued in possession of farm is against presumption of delivery.* That the grantor continued in the possession of the farm after the execution and recording of a deed to his daughters, dividing the profits from the farm with them as he had done before, tends to show that the delivery of the deed to one of his daughters to place among his papers was not intended to vest title in them at once.

5. SAME—*grantor must have notice of the acts of ownership to be bound thereby.* Where father and daughters reside as a family upon the farm after he executes a deed to them, the fact that the land was assessed and insurance policies were issued in the daughters' names is not binding upon the father as a recognition of their title without proof that he knew and consented to such acts.

APPEAL from the Circuit Court of Grundy county; the Hon. S. C. STOUGH, Judge, presiding.

This is a bill in chancery filed by appellant in the circuit court of Grundy county against his three daughters, Elizabeth Wilenou, Paulina Wilenou and Anna Handlon, and William Handlon, husband of Anna, to cancel and set aside as a cloud upon his title the record of a deed bearing date February 18, 1899, executed by the appel-

lant to his said daughters, and purporting to convey to them his farm, containing four hundred and forty acres, located in said county, which deed was recorded in the office of the recorder of deeds of Grundy county on the 20th day of February, 1899. Elizabeth and Paulina disclaimed any interest in the farm, and Anna and her husband filed an answer denying the allegations of the bill, and averring that Anna was the owner of an undivided one-third part thereof. A replication was filed, and the case was referred to the master to take proofs and report his conclusions as to the facts and the law. A report was filed by the master, in which it was found that Anna was the owner of the undivided one-third part of the farm in fee, and objections and exceptions having been filed thereto and overruled, a decree was entered finding that Elizabeth and Paulina, by reason of their disclaimer, had no interest in the farm and decreeing Anna to be the owner of the undivided one-third part thereof in fee, and as to her dismissed the bill for want of equity, from which decree appellant has prosecuted an appeal to this court, and has assigned as error the finding of the court that Anna was the owner of the undivided one-third part of said farm in fee and in entering a decree dismissing the bill for want of equity as to her.

It appears from the pleadings, proofs and master's report that appellant is a German, was a widower, and was about seventy years of age at the time of the execution of the deed sought to be canceled; that he came to America when a young man; that many years ago he purchased the farm in question, which was not the best quality of soil but was adapted to the raising of stock and upon which he and his family made their home; that by industry and economy, with the assistance of his wife, he improved and paid for the same and raised his family, which consisted of five girls: the defendants; a married daughter who died several years prior to the execution of the deed, leaving five small children, who had had

a home, since their mother's death, with the appellant; and another married daughter, who married a man by the name of Allen Spellman, and who resides in Coal City, not far from said farm; that subsequent to the time of the death of appellant's wife, which occurred some ten years prior to the date of the deed, the defendants were the house-keepers of the appellant; that the appellant disliked his son-in-law, Spellman, and said he should have none of his property; that appellant had been in poor health, and a short time prior to the execution of the deed he seems to have been impressed with the fact that he might soon die, and on one or two occasions talked with his three daughters about making a disposition of his property in view of that fact. He testified he told his three daughters that he wanted the farm, upon his death, divided equally between them, and that they should take care of the children of his deceased daughter, and if any one of said daughters married she was to have \$1000 in cash at the time of his death and have no interest in the farm; that some six weeks prior to the execution of the deed the appellant met Patrick Howard, whom he had known for thirty years, on the street in Coal City. Howard testified: "I met him and shook hands with him, and I says, 'Fred, how are you getting along now?' and he says, 'I am not getting along good; I am filling up here and can hardly breathe.' He seemed to be laboring for his breath, and he says, 'I think I would be all right on account I get my property settled before I die,' and I says, 'Why don't you make a will?' and he says, 'I don't like wills; afraid of trouble afterwards.' 'Well,' I says, 'Fred, now my father is gone and our property was willed, and it has gone through the probate courts and has cost considerable money, but if I had property I should deed it as I wanted it to be,' and I do not know just what answer he made, but in a very short time after that, the very first thing I saw in the paper was this transfer."

On the day the deed was executed the appellant was in Coal City. While passing a saloon he says he heard his son-in-law, Spellman, say, "I saw my old father-in-law and he looks bad, and I think he will kick the bucket soon." He immediately went to the office of Joseph Campbell, a notary public in Coal City, and Campbell drew the deed in question and appellant executed it. Campbell testified: "My impression was that he was pretty sick at the time he came to my office. I do not think I knew the nature of his ailment. I do not know as I remember exactly what was said. My impression was that he wanted to have a deed to take the place of a will. He didn't expect to live long at that time, and after his death he wanted the property to go to the grantees therein. Neither of the grantees was there,—just himself. I think I have heard him say that Mr. Spellman, his son-in-law, should not participate in the disposition of his estate. About the time he made the conveyance was when I heard him make such a remark."

After the deed was executed it was sent by Campbell to the county seat and recorded and then returned to Campbell, when the appellant called and it was delivered by Campbell to him. He said nothing to either of his daughters about having made the deed until after it had been recorded and returned to him by Campbell. When he reached home with the deed he gave the deed to one of his daughters and told her to put it with his papers, and she put the deed in the bureau drawer with the other papers of the appellant, where it remained until this suit was commenced.

Elizabeth testified: "I had a conversation with father about the disposition of his property in case of his death. He said he was going to make a deed to us children. He said he was going to make a deed over to his children. We were to have it when he died. I know he did make a deed to the three girls, Elizabeth, Anna and Paulina. I remember him bringing it home.

Q. "What was done with the deed at that time?"

A. "Gave it to me and told me to put it among his papers.

Q. "And what did you do with the paper?"

A. "I put it away.

Q. "Did you ever see the deed after that?"

A. "No, sir.

Q. "Does he have a certain place where he keeps all his papers?"

A. "Yes, sir.

Q. "Referring back to the time he mentioned about making this deed, can you recall anything else that was said at that time about who was to have the property?"

A. "He said his children would have the property.

Q. "When were they to have it?"

A. "After death.

Q. "Was anything further said about their leaving the home?"

A. "He said that the one who would leave home was to have \$1000 after he was dead.

Q. "And what was to become of the property?"

A. "We were to have it and keep the grandchildren together—his grandchildren.

Q. "You may state whether or not, if anything was ever said as to when you were to have the property.

A. "We wasn't to have it until after father died."

Paulina testified: "In the fall father's health was pretty good, but later in the winter he had poor health and the latter part of the winter was under the doctor's care, and he thought he wouldn't last very long. He talked this over at home before sister Anna and myself. I think it was in January that he first talked about making the deed. He said he would give the property to us three. We were to take care of the grandchildren, and if one of us left home before he died we were only to get \$1000. All three were present. Father afterwards made a deed. I do not know the date of it.

Q. "Do you know what he did with it?"

A. "He brought it home, and we three were in here, and he said: 'Here is the deed, and I have fixed it so you three will have the property. Put it among my papers, so you will know where it is if I should die suddenly.'"

Q. "To whom did he hand the deed?"

A. "He handed it to my sister Elizabeth."

Q. "Do you know what she did with the deed?"

A. "Put it in a drawer among his papers."

Q. "Did he ever give the deed, to your knowledge, to your sister Anna?"

A. "No, sir; he never did."

Q. "Did you or your sister Elizabeth or Anna ever have possession of the deed?"

A. "No, sir."

The appellant testified:

Q. "How did you come to have the deed recorded?"

A. "Campbell was thinking it was better."

Q. "Did anybody tell you to have it recorded?"

A. "Campbell told me it would be better; that the way I was I might die in a day or two."

Q. "When you took the deed home, to which one of the girls did you hand it to?"

A. "I think I handed it to two of them. I wanted to take my coat off and lay right down. They took it and put it among my papers and I afterwards found it there. I have had it all the time since. They could get to it, for I never had anything locked up."

Q. "At the time you had the deed made and the same placed upon record, did you intend to pass the present estate to the children?"

A. "Not as long as I lived."

Q. "When you took the deed home, did you deliver it to either or any of the girls with the intention of giving them the farm at that time?"

A. "No, sir."

Q. "Did you at that time deliver the deed to either of them?"

A. "No, I just handed it to them and told them to throw it in my papers, and I took my coat off and lay down.

Q. "Since the 18th of February, 1899, have you been in possession of this farm?"

A. "Yes, sir.

Q. "Did you ever deliver the possession of the farm over to the girls?"

A. "No, sir."

At the time the testimony was taken before the master, Elizabeth was forty-two, Anna thirty-nine and Paulina thirty years of age. They all had worked in and about the home, at times doing the work of men upon the farm, and after the mother's death shared in a part of the profits of the farm with the father. Anna had received superior educational advantages to those of her sisters and taught in the public schools of Grundy county for ten years. There was no apparent change in the possession of the farm after the deed was executed and no change in the manner of conducting the same. In the year 1901 Anna married Handlon, very much against the wishes of her father. Her marriage displeased him greatly. Prior to her marriage he said to her if she married Handlon she would get nothing from the farm. She replied, all she wanted was what she had earned teaching school, and she took with her from \$1800 to \$2000 in money when she left home. Shortly after her marriage the appellant asked her to release to him any apparent interest which she might have in the farm by reason of the deed having been made a matter of record, which she declined to do, and the bill was then filed.

The appellant, after the deed had been made, told different persons he had deeded the farm to the girls, and after the deed was recorded the land was assessed in the names of the girls, and at least one tax receipt was taken

in their names. The insurance was renewed upon the buildings after the deed was executed and a new insurance policy was taken in the names of the girls. It does not appear, however, that the land was assessed and the insurance renewed in the names of the girls by the direction of the appellant.

E. L. CLOVER, for appellant.

CORNELIUS REARDON, for appellees.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

The main question presented here for determination is, did the appellant deliver the deed executed by him on February 18, 1899, to his three daughters, or to one of them for the benefit of all, with the intention that it should then take effect and the title to said farm immediately vest in them, or was the deed in the nature of a testamentary disposition of the farm? That is, did the appellant intend the deed should not take effect and the title to the farm vest in his daughters until after his death? The deed was recorded by him, but that is not conclusive evidence that he then delivered it absolutely or that he intended it to at once take effect. When the deed was executed the grantees were not present. Neither did they have any knowledge of the fact that it had been executed until after it had been recorded. The first time they received notice that the deed had been executed was when the appellant brought it home with him. He then gave it to one of his daughters and told her to place it among his papers, where it could be found in case of his death. Anna testified, when her father brought the deed home with him he gave it to her and Elizabeth, and said: "Here is the deed; now you take care of it." We think the weight of the evidence strongly preponderates in favor of the appellant's contention that he did not

deliver the deed to his daughters with the intention that it should then vest in them the title to the farm.

In the case of *Brown v. Brown*, 167 Ill. 631, a bill was filed by the father to cancel, as a cloud upon his title, a deed which he had executed to his son and caused to be recorded. On page 636 it was said: "It is true, the deed was placed upon record; but that fact, of itself, does not establish a delivery of the instrument. If a grantor, without the knowledge or assent of the grantee, place a deed on record, that will not constitute a delivery, for the reason the grantee has not assented to receive the deed, and it is well settled that it is essential to the legal operation of the deed that the grantee assents to receive it. Without acceptance on behalf of the grantee there can be no delivery. (*Herbert v. Herbert*, Breese, 354; *Kingsbury v. Burnside*, 58 Ill. 310; *Maynard v. Maynard*, 10 Mass. 458; *Sullivan v. Eddy*, 154 Ill. 199.) Here, from all the evidence, it is apparent that the grantor himself placed the deed on record, and after it was recorded he retained the possession and control of the instrument, and if at any time the deed passed out of his possession the act was without his consent, and hence did not affect his rights. *Wormley v. Wormley*, 98 Ill. 544."

If the deed was intended by the appellant to operate as a will, and not as a deed, it was not delivered. In *Hayes v. Boylan*, 141 Ill. 400, Patrick Boylan executed a deed to a piece of real estate to his three sons. He handed it to one of them with instructions, "Take this deed and put it in the box in the bank." He further said, "The boys need not know anything about this till after my death." The circuit court held the deed was delivered, but this court reversed its decree, and on page 406 said: "It is plain that the intention of Patrick Boylan was to have the deed to take effect only after his death. On its face the deed purported to operate presently, but he intended to, and did, retain the possession of the land and received and enjoyed its rents during his life. He

did not deliver the deed *in escrow* to a third party, with direction to him to deliver it to the grantees therein named after his death, but he retained its possession himself until his death, intending that it should become operative only after that event,—in other words, he intended it should operate precisely as a will without having it executed and witnessed as a will."

It has been held, if a parent execute a deed to an infant child which is beneficial to the child, and manifests by his words and acts that he intends the deed shall operate at once, a delivery will be presumed and proof of actual delivery is unnecessary. This is because the infant is incapable of doing any act in regard to the deed which he may not avoid on reaching his majority, and it is the duty of a parent, as his natural guardian, to accept and preserve the deed for him. (*Hayes v. Boylan, supra.*) The grantees here were all of age, and the presumption of delivery in their favor does not obtain,—at least to the extent it would if they were minors; and if such presumption did obtain, the circumstances under which this deed was executed and recorded, and the fact that it was retained by the grantor and placed by one of the grantees, by his direction, among his papers, with the view that it might be readily found in case of his death, rebuts the presumption of delivery.

In *Cline v. Jones*, 111 Ill. 563, Cline went alone before a justice of the peace and had drawn up and signed and acknowledged, a warranty deed of the land in controversy to Mrs. Jones, his daughter, the deed reciting it was made in consideration of love and affection and one dollar. He told the justice he had given all his other children land but none to Mrs. Jones, and he felt he ought to give her said land. After he had executed the deed he told many persons that he had made the deed; that he had made his children equal; that Mrs. Jones would have the land upon his death. He also said to Mrs. Jones and her husband he had fixed it so that the

land would be hers at his death, but if she would move on the land it should be hers immediately. That she did not do. He retained the possession of the deed until his death, also the possession of the land. It was held the deed was not delivered and for that reason it did not convey the title. It was there said (p. 569): "The deed by its purport was absolute, conveying the grantor's entire interest, to operate immediately. But the evidence shows the deed was not intended to be absolute, but to be qualified in its effect; that it was not intended to convey the grantor's whole interest, but that he meant to have a life estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee. As, then, there was never any actual delivery of the deed but the grantor ever kept it in his own possession, and as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instrument as the deed of the grantor, and it was not valid as a deed."

Mr. Lewin, in his work on Trusts, on page 124 quotes from the case of *Habergham v. Vincent*, 2 Ves. Jr. 203, as follows: "A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing the interest to be conveyed at the execution; but a will is quite the reverse, and can only operate after death." The author then proceeds: "We may therefore safely assume as an established rule, that if the intended disposition be of a testamentary character and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative unless it be declared in writing, in strict conformity with the statute enactments regulating devises and bequests."

The evidence in this case also shows that the appellant remained in the possession and was in the possession of the land at the time he commenced this suit. The fact that the grantor remains in possession of the land after the deed is made is considered and commented upon in all the decided cases as an important fact in determining whether a deed for land made to a party out of possession has been delivered. The facts of this case are peculiar. The grantor was old and infirm and his daughters resided with him. They often did the work upon the farm usually performed by men. He advised with them as to whom the land should be rented to when rented, and divided with them the income of the farm,—that is, the profits arising from the grain and hay raised on the farm and stock raised and sold from the farm,—before and after the execution of the deed. The fact that the land was assessed in the names of the girls and an insurance policy was written upon the buildings in their names, if the assessment was made and the policy written without the knowledge or assent of the appellant, would not bind him. If the appellant was to be bound by such facts, the burden of proof was upon Anna to show that he knew of such facts and assented thereto. This she failed to do. The fact that the appellant stated to different persons that he had made a deed of the farm to the girls is not inconsistent with the view that he intended the deed to take effect only upon his death.

We have examined this record, which is voluminous, with care, and are fully convinced that the appellant did not intend to transfer by said deed to his three daughters, absolutely, said farm, which represents the accumulations of a lifetime and which transfer would have left him almost penniless, as it is conceded the farm was substantially all he had and the deed was without any valuable consideration, but are confident, in view of what appellant supposed was approaching death, he sought by said deed to make a disposition of his property which

would place the title in his three daughters after his death.

The decree of the circuit court will be reversed and the cause remanded to that court, with directions to enter a decree in favor of the complainant and against all the defendants, in accordance with the prayer of the bill of complaint.

*Reversed and remanded, with directions.*

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BERNHARD PFAELZER

v.

HENRY KAU.

*Opinion filed February 17, 1904.*

**BILLS AND NOTES**—*liability of guarantor not released by payee's negligence in demanding payment.* One who unconditionally guarantees payment of a promissory note at maturity by endorsing it in blank is not released from liability although the payee delays notice of the maker's non-payment until the latter, although solvent at the maturity of the note, has become insolvent and the guarantor is consequently unable to enforce payment against him.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

**BINSWANGER & JACKSON**, for appellant:

A guarantor, while liable as an original obligor, is entitled to show *laches* as a defense, when he also shows that he would not be required to sustain loss except for such *laches*. The payee of a note cannot neglect to collect from the maker when the maker was financially responsible when the note matured, and neglect even to notify the guarantor that the note remained unpaid, and then, after the maker has become insolvent, throw the

burden upon the guarantor, and thereby cause the guarantor an unnecessary loss by such neglect of ordinary and reasonable diligence on the part of the payee. *Voltz v. Harris*, 40 Ill. 159; *Heaton v. Hulbert*, 3 Scam. 489.

The above rule is not changed by the later decisions. *Rich v. Hathaway*, 18 Ill. 549; *Dickerson v. Derrickson*, 39 id. 576; *Parkhurst v. Vail*, 73 id. 347; *Gage v. Bank*, 79 id. 62; *Penny v. Crane Bros. Manf. Co.* 80 id. 245; *Hooker v. Gooding*, 86 id. 60; *Stowell v. Raymond*, 83 id. 120.

The text writers and the courts of other States recognize the above rule with respect to *laches* accompanied by resulting damage. 2 Parsons on Bills and Notes, 137; 2 Daniel on Neg. Inst. sec. 1787; 3 Kent's Com. 124; Story on Notes, (6th ed.) sec. 460; Edwards on Bills and Notes, 242; *Reynolds v. Douglass*, 12 Pet. 497; *Sabin v. Harris*, 12 Iowa, 92; *Farrow v. Respass*, 33 N. C. 173; *Bank v. Haynes*, 25 Mass. 423; *Lemmert v. Guthrie*, 95 N. W. Rep. 1047; *McMillan v. Bank*, 32 Ind. 11; *Whiton v. Mears*, 11 Metc. 563; *Talbot v. Gay*, 18 Pick. 534; *Simons v. Steele*, 36 N. H. 80; *Bank v. Kercheval*, 2 Mich. 504.

E. P. LANGWORTHY, for appellee:

Where the name of a party not the payee is found written on the back of a note, it will be presumed that he placed it there at the time the note was made, and that he signed it as a guarantor. *Klein v. Currier*, 14 Ill. 236; *Boynton v. Pierce*, 79 id. 145; *Coal Co. v. Crane Bros.* 138 id. 207; *Parkhurst v. Vail*, 73 id. 343; *White v. Weaver*, 41 id. 409; *Carroll v. Weld*, 13 id. 683; *Stowell v. Raymond*, 83 id. 120; *Webster v. Cobb*, 17 id. 459; *Blatchford v. Milliken*, 35 id. 434; *McDonald v. Harris*, 75 Ill. App. 111; *Camden v. McKoy*, 3 Scam. 437.

An endorsement in blank, like the one in this case, confers authority upon the payee to write above it a guaranty which shall be consistent with the nature of the instrument. *Camden v. McKoy*, 3 Scam. 436; *Cushman v. Dement*, id. 497; *Webster v. Cobb*, 17 Ill. 459; *Maxwell v.*

*Vansant*, 46 id. 58; *Hance v. Miller*, 21 id. 636; *Boynton v. Pierce*, 79 id. 145.

The liability of a guarantor depends not upon, nor is it in any manner affected by, the solvency or insolvency of the maker of the note, and the question of due diligence is not an element in the case. *Parkhurst v. Vail*, 73 Ill. 343; *Stowell v. Raymond*, 83 id. 120; *Hooker v. Gooding*, 86 id. 60; *Penny v. Crane Bros. Manf. Co.* 80 id. 244; *Gridley v. Capen*, 72 id. 11; *Pool v. Roberts*, 19 Ill. App. 438; *Gage v. Bank*, 79 Ill. 62; *Worden v. Salter*, 90 id. 160; *Rich v. Hathaway*, 18 id. 549; *Klein v. Currier*, 14 id. 236; *Hance v. Miller*, 21 id. 636; *Holm v. Jamieson*, 173 id. 295; *Dickerson v. Derrickson*, 39 id. 574; *Ewen v. Wilbor*, 99 Ill. App. 132; *Donovan v. Griswold*, 37 id. 616.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This was a suit in assumpsit, begun in the superior court of Cook county on March 14, 1901, by appellee, on a promissory note, payable to himself, for the sum of \$1500, dated July 27, 1900, due six months after date, with interest at six per cent from date, signed by Leopold Pfaelzer, across the back of which, in blank, appeared the signatures of Bernhard Pfaelzer, the appellant, and Hattie Pfaelzer. All three were made defendants. Appellant alone defended. He interposed the general issue, and a stipulation was made that he should have the right to make any defense under that plea that he could make under any special plea properly pleaded. A trial by a jury resulted in a verdict and judgment for the full amount of the note and interest. Appellant prosecuted an appeal to the Appellate Court for the First District, where the judgment was affirmed, and he now presents the record to this court for review.

Appellee sought to charge appellant and Hattie Pfaelzer as guarantors. Two defenses were interposed, which were submitted to the jury: First, that the signature of

appellant was not placed upon the back of the note until several days after the note had been delivered and the consideration therefor passed to the maker, and there was no consideration for the contract of appellant; and that, in any event, the contract of appellant was that of an endorser, and not that of a guarantor. On these two questions the evidence was sharply conflicting. It is conceded that the facts would not warrant a recovery against appellant if he were an endorser rather than a guarantor. There was no evidence at all to show any consideration for the contract of appellant, evidenced by his signature, except the original consideration for which the note was given.

It is urged that the jury was not properly instructed in reference to the law distinguishing a guarantor from an endorser. The instructions accurately stated the elements necessary to constitute a contract of guaranty between the parties, and the jury were emphatically advised that if Bernhard Pfaelzer was not liable as a guarantor he was not liable at all; that if his signature was placed upon the back of the note in accordance with any contract except a contract of guaranty he was not liable, and that if his signature was not placed upon the note until after the note was delivered he was not liable. We think the instructions correct. The judgment of the Appellate Court is therefore final so far as the defenses to which we have alluded are concerned, and in this court appellant must be considered a guarantor.

Appellant sought to interpose another defense, which did not reach the jury, as the court, on objection, refused to admit the evidence which was offered for the purpose of showing that the maker of the note was solvent at the time of the maturity of the note and remained solvent for a considerable period thereafter, but became wholly insolvent before any demand was made upon him for the payment of the note, before any notice to appellant of such default in payment and before this suit was

brought. The proposition urged upon us is, that while it is not necessary, in order to charge the guarantor in the first instance, to show diligence on the part of the plaintiff or a demand upon the maker or notice of default to the guarantor, still the guarantor may establish an affirmative defense by showing the facts which appellant offered to prove in this case; while the position of appellee is, that it is the duty of the guarantor to pay the note on the day it matures if the maker defaults, and that no *laches* or delay of the payee will affect or alter the liability of the defendant, unless, indeed, the bar of the Statute of Limitations shall have intervened.

The authorities are conflicting on this proposition. This is explained to some extent by the varying terms of the contracts of guaranty with which the courts have dealt. The blank on the back of the note in this case has never been filled up. Appellee presented instructions to the jury on the theory that it was a contract of guaranty, and in view of the subsequent history of the case we necessarily treat it as a contract reading substantially as follows: "For value received I hereby guarantee the payment of the within note at maturity."

Upon such a guaranty it has been held in Massachusetts that the guarantor will be discharged by neglect of the holder to demand payment of the maker and to give the guarantor notice of non-payment, provided the maker was solvent when the note fell due but has since become insolvent. (*Oxford Bank v. Haynes*, 8 Pick. 423.) In New York, on the other hand, it is held that the guarantor will *not* be discharged by neglect of the holder to demand payment of the maker and to give the guarantor notice of non-payment, where the maker was solvent when the note fell due and has since become insolvent. *Brown v. Curtis*, 2 Coms. 225.

In our own State there is some apparent lack of harmony. The principal case relied upon by appellant is that of *Heaton v. Hulbert*, 3 Scam. 489, where this language

was used: "The result of my investigation of this subject is, that it was not necessary for the plaintiff to institute legal proceedings against the maker or endorser of the note, nor to show their insolvency, nor to prove demand and notice of non-payment, in order to establish the liability of the guarantor, but that the defendant might have discharged himself from such liability by showing *laches* on the part of the plaintiff in the collection of his debt and a resulting injury to the defendant, such as an omission to make demand and give notice within a reasonable time, and a loss to the guarantor in consequence of such omission. The doctrine of demand and notice, as applicable to commercial paper, has but this qualified application to guaranties: *Laches*, and a consequent injury, must be shown, and the *onus probandi* rests upon the defendant. It is to be observed, however, that a distinction has been taken between the absolute guaranty of a promissory note, or a sum ascertained and certain, and a letter of credit, with a guaranty which requires acceptance and notice, and what is here said is to be restricted to that class of cases to which the one before the court properly belongs." The only case that has followed the view there expressed is *Voltz v. Harris*, 40 Ill. 155, where it is said: "He entered into the contract of guaranty with his eyes open and must perform all its stipulations, unless he can show the appellees have been guilty of some *laches*, by which he has been injured." It will be observed that in neither of these cases was the point now before us squarely presented. In neither of them was there any evidence that the guarantor had been injured or damaged by delay in bringing the action against the principal debtor, and what was said in reference to the effect of *laches* and delay was unnecessary to the decision of either case. In both cases it was objected that the creditor had not given notice of non-payment to the maker, and in each it was held that the payee was not required to give such notice, and in

neither case was there any offer to show insolvency of the principal debtor.

In *Parkhurst v. Vail*, 73 Ill. 343, while the statement of the case does not show that the original maker had become insolvent after the maturity of the note, the case seems to have been tried on that theory, and the court, in discussing a refused instruction, used this language: "It is the doctrine of this court, as that of others, that the liability of a guarantor depends not upon, nor is it in any manner affected by, the solvency or insolvency of the makers of the note, and the question of due diligence is not an element in the case. It is an original undertaking by the guarantor that he will pay at all events. This is the life of the doctrine, and therein is it distinguishable from the liability of a mere endorser."

This court has had contracts similar to the one now before us under consideration on several other occasions.

"No legal proceedings are necessary to fix the liability of a guarantor, or to show the insolvency of the maker, or to prove demand or notice of non-payment, or to use diligence against the maker." *Stowell v. Raymond*, 83 Ill. 120.

"The creditor, on this paper, was not in any sense the curator of the interests of the security or guarantor. By accepting this paper he assumed no such position. He owed to him no affirmative duty in this regard. He made no implied or express contract to assume any such duty. The holder of this paper was not under any obligation to the guarantor to make prompt demand of payment and give notice of non-payment." *Hooker v. Gooding*, 86 Ill. 60.

"The definition of a guaranty, by text-writers, is, an undertaking by one person that another shall perform his contract or fulfill his obligation, or that, if he does not, the guarantor will do it for him. A guarantor of a bill or note is said to be one who engages that the note shall be paid, but is not an endorser or surety. (2 Parsons on Bills and Notes, 117.) If this be so, then he must

be regarded as an original promisor; and this, we believe, is the doctrine of adjudged cases." *Gridley v. Capen*, 72 Ill. 11.

Where the maker, Cramer, had left the State and suit was brought against the guarantor, it was said: "By the terms of this guaranty no terms were imposed upon appellee that he should sue the maker or do any other act. He could remain passive, and the guarantor should have looked to it, before Cramer left the State, that he had paid this note." *Worden v. Salter*, 90 Ill. 160.

"Any person, whether a party to the note or not, may guarantee its payment by the maker within any time specified, or may impose any terms or conditions to his guaranty which he may choose, and he will only be liable to the holder according to the terms of his agreement. If he guarantee payment, at maturity, to the holder without imposing other conditions, he need not protest or give notice of non-payment or institute legal proceedings to hold the guarantor. If such steps are necessary it is only because they have been imposed by the terms of the contract of guaranty. When the money is not paid according to the terms of the guaranty, the person holding the guaranty has a right to sue upon it and recover of the guarantor." *Hance v. Miller*, 21 Ill. 636.

"It is also insisted that notice should have been given to appellant that Kimball had failed to pay the money before he could be held liable as guarantor. There can be no question that where the guaranty is absolute it is the duty of the guarantor to see to the payment of the money. In such a case no demand or notice of non-payment is required, but the holder may institute suit at maturity of the debt without taking any other steps. In *Hance v. Miller*, 21 Ill. 636, this rule was recognized. When, however, the guaranty depends upon the happening of a contingent event, it is necessary, when the event has occurred, that notice should be given to the guarantor within a reasonable time. This is manifestly proper,

to enable the guarantor to secure himself against loss. (2 Parsons on Contracts, 174.) But what is a reasonable time depends upon the circumstances of the case. If, however, it is given before loss could occur or the situation of the parties become changed so as to endanger loss, it is believed to be sufficient. If delayed so long as to deprive the guarantor of the means of rendering himself secure it would not be in time and the guarantor would be released." *Dickerson v. Derrickson*, 39 Ill. 574.

"Where the payee of a promissory note or third parties execute a contract written on the back of an unconditional promissory note for the payment of money at a specified time, in which they guarantee the payment of the promissory note at maturity, the holder of the note is under no obligation to demand payment of the maker and on default of payment notify the guarantors. The reason is obvious. The contract of the guarantors is absolute and unconditional, and it requires payment by the guarantors upon maturity of the note. This rule is clearly laid down in *Gage v. Mechanics' Nat. Bank of Chicago*, 79 Ill. 62, and is well sustained by authority. The principle upon which this doctrine rests is that the contract is absolute, and not conditional or collateral." *Taussig v. Reid*, 145 Ill. 488.

It is true, as suggested by appellant, that in none of these cases, with the exception, perhaps, of the *Parkhurst case*, where, after maturity, the principal debtor seems to have become insolvent, and the *Worden case*, where he had evidently gone out of the State after the debt came due, so that process could not be served upon him, does it appear that the guarantor had been in anywise damnified by the failure to give him notice of non-payment, but the reasoning of these cases is like that of the New York Court of Appeals, and is to the effect that the guaranty here under consideration is an absolute agreement by the guarantor that the maker will pay the debt at maturity. The moment the principal debtor is in

default that moment the guarantor is in default, and an action could be immediately brought against him. It is his duty to pay, and to pay right then. If it be argued that the payee is negligent for a failure to immediately seek the satisfaction of the obligation which he holds, the guarantor is likewise negligent in failing to meet that obligation, and as he has become responsible for the default of the principal, it seems just, if he does not desire to incur the risk of the principal thereafter becoming insolvent, that he should be diligent himself to meet his obligation and enforce the cause of action against his principal.

*Dickerson v. Derrickson, supra*, leads to the conclusion that in this State the rule contended for by appellant applies only where the guaranty is a conditional or collateral one.

The question before us is one in reference to which courts and text writers of the most eminent respectability differ, but in view of the absolute and unconditional character which this court has determined such an undertaking as we here consider bears, we feel ourselves committed to the doctrine that he who guarantees the payment of a promissory note at its maturity by writing his name across the back thereof is not entitled to notice of non-payment, and that if the payee does not give notice of non-payment until the maker, who was solvent at the maturity of the note, becomes absolutely insolvent, the guarantor is not thereby discharged, even though he is obliged to pay the debt, and, as a consequence of the delay, is unable to enforce payment thereof against the principal.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

DWIGHT L. SMITH

v.

JOHNSTON MYERS.

*Opinion filed February 17, 1904.*

1. **BILLS AND NOTES**—*law of place where note was delivered controls liability.* In an action on a negotiable instrument the law of the place where the same was delivered and negotiated controls in determining liability thereon.

2. **SAME**—*endorsement upon back of non-negotiable instrument creates no liability as an endorser.* The signing by a third party of his name upon the back of a contract for the payment of money, which is not a negotiable instrument, does not create the liability of an endorser or guarantor within the law merchant.

3. **SAME**—*when an instrument is not a promissory note.* A written promise for the payment of a sum of money, with interest "and taxes," is not a promissory note, where there is nothing in the instrument which renders the amount of such taxes certain.

4. **SAME**—*when word "taxes" in written instrument cannot be rejected as surplusage.* The word "taxes," used in a written promise to pay a sum of money, with interest and taxes, refers to the taxes upon the instrument or the debt evidenced thereby, and is not so indefinite and uncertain as to be rejected as surplusage.

*Smith v. Myers*, 107 Ill. App. 410, affirmed.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. CHARLES A. BISHOP, Judge, presiding.

HOYNE, O'CONNOR & HOYNE, for appellant.

BLEWETT LEE, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from the Appellate Court for the First District affirming a judgment of the circuit court of Cook county against appellant for costs in a suit brought by appellant, against appellee, in an action of assumpsit. The action was upon the following instrument in writing:

"WATERBURY, CONN., Aug. 1, 1893.

"One year after date I promise to pay to the order of Norman D. Grannis thirty-five hundred dollars at the Fourth National Bank. Value received, with interest at six per cent per annum and taxes. Due August 1, 1894. W. C. MYERS."

Endorsed on the back as follows:

"Feb. 8, 1894, rec'd \$532.87 on within note.

"Dec. 3, 1894, rec'd on within note \$49.23.

"Dwight L. Smith, Aug. 3d, 1893.

"Rev. Johnston Myers, Cin., O., July 31, 1893.

"N. D. Grannis."

The declaration contained two special counts and the common counts. The first special count was by appellant as second endorser and against appellee as first endorser. The second special count was by appellant as endorser or assignee of the note against appellee as endorser. The averment in each count was that the endorsement was made before the delivery of the note; that the contract was made and delivered at Waterbury, Conn., and that by the laws of that State the blank endorsement of a negotiable or non-negotiable note by a person who is neither its maker nor its payee, before or after its endorsement by the payee, shall import the contract of an ordinary endorsement of negotiable paper, as between such endorser and the payee or subsequent holder of such paper.

When the instrument and the endorsements sued on were offered in evidence, objection thereto was made by counsel for appellee, first, on the ground of variance between the instrument and the declaration; second, because a material alteration appears to have been made by adding the words "Aug. 3d, 1893," after the signature "Dwight L. Smith;" third, because it appears from the note that Smith is a prior endorser, and therefore can not recover from Myers, a subsequent endorser; and fourth, because the words "and taxes" make the amount due uncertain and deprive the note of negotiability. A

specific objection was made to the words "Aug. 3d, 1893," after the signature of Dwight L. Smith, upon the ground that such words were, in effect, the offering of parol evidence to change or vary the effect of Smith's endorsement. To these objections the court ruled, "For the present I will admit the note in evidence." Appellant then proved, by depositions, that the payee and maker of the note, as well as appellant, all lived, at the time of the execution and delivery of the instrument, in Waterbury, Conn., and also proved that after the time of payment arrived, payment was not made by the maker and protest was had for non-payment; that the amounts appearing as credits upon the instrument were paid by the trustees of the maker, the latter having become insolvent, and that appellant paid the balance due thereon at the time he received the note. There was no proof of any consideration having been paid appellee for his endorsement.

Appellee introduced in evidence sections 1860 and 3828 of the general statutes of Connecticut in force January 1, 1888, as follows:

"Sec. 1860. The blank endorsement of a negotiable or non-negotiable note by a person who is neither its maker nor its payee, before or after the endorsement of such note by the payee, shall import the contract of ordinary endorsement of negotiable paper, as between such endorser and the payee or subsequent holders of such paper."

"Sec. 3828. Personal property in this State or elsewhere, not exempt by its title, shall, for the purpose of taxation, include all notes, bonds and stocks," etc.

Appellant offered to prove a certain conversation between him and the maker of the note at the time he became an endorser, for the alleged purpose of showing that it was a condition of his endorsement that appellee should also endorse, and further offered to prove by certain alleged letters of appellee that appellee had recognized or admitted some liability to appellant by reason

of having endorsed the instrument, and had made certain offers of settlement. This evidence was excluded by the court.

The trial was before a jury, and appellant asked the court to instruct the jury to find a verdict for him. This instruction the court refused, and at the request of appellee gave an instruction to find the issues for the defendant, which was done and judgment for defendant for costs was accordingly entered.

Numerous errors are assigned, among which are the refusal of the court to admit the excluded evidence mentioned and the admission of certain evidence on behalf of appellee, and the refusal of the court to give the instruction asked by appellant directing a verdict in his behalf and the giving of the instruction as requested by appellee.

The contention of appellant is that the instrument sued on is a promissory note, carrying with it all the legal effects and incidents of such writing, while the appellee contends that said instrument is only an ordinary contract for the payment of money, and not a promissory note, because of the addition of the words "and taxes," following the provision for interest and preceding the name of the maker.

If the instrument sued on is a promissory note, we think the clear legal inference from the facts shown by the record is that it was delivered at Waterbury, Conn., and the rule seems to be, that in an action upon a negotiable instrument the law of the place where the same is delivered and negotiated is to control in determining the liability, if any, thereon. (*Gay v. Rainey*, 89 Ill. 221.) And the place where a contract is made depends, not upon the place where it is actually written, but on the place where it is delivered, as consummating a bargain. (1 Daniel on Neg. Inst. 660.) Under the statute of Connecticut, as introduced in evidence, if the instrument in question can be held to be a promissory note, the rela-

tion between appellant and appellee to the same was that of endorsers and not of guarantors, (*Spencer v. Allerton*, 60 Conn. 410,) as the statute declares that whether the endorsement be before or after the endorsement by the payee it shall import the contract of an ordinary endorsement. If the instrument is not a promissory note, then it is clear that appellee bore no such relation to it as would render him liable under the proof disclosed in this record.

Upon a mere contract for the payment of money or the performance of any other covenant, where the instrument is not such as comes within the definition of a negotiable instrument, one by merely signing his name upon the back thereof does not become either a guarantor or an endorser, within the law merchant. There are many instruments that may be transferred by assignment of the holder or payee, and which are sometimes called negotiable instruments, such as bills of lading, warehouse receipts and other assignable contracts, for the performance of the terms or covenants of which one may become a guarantor; but the contract of guaranty on such instrument will not arise by the mere signing of the name of a person, not a party thereto, on the back thereof. We take it the only possible relation between the parties here, under the law, if it could be held that the instrument in question is a negotiable instrument, would be that of endorsers, and the relation of endorsers, which appellee and appellant must have borne to the instrument in question, is in a technical sense applicable only to a relation touching negotiable paper. While to write one's name on the back of a writing is literally to endorse it, in its technical sense and in the sense in which it is used when applied to negotiable paper it means writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity and is not paid by him and such fact is duly

notified to the endorser. (1 Daniel on Neg. Inst. 667.) Such was the rule of the law merchant, which has been modified, to some extent, in this State, where such instruments are controlled by the laws of this State, by requiring that suit be timely brought or that it be shown that suit would be unavailing.

A promissory note, as defined by the English Bills of Exchange act, (sec. 83,) is: "An unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum in money to, or to the order of, a specified person or to bearer;" or as usually defined: "An unconditional promise in writing for the payment of a certain sum of money absolutely and in all events." (4 Am. & Eng. Ency. of Law,—2d ed.—77.) And as defined by Chitty: "A promise or agreement in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer." (Chitty on Bills, 516.) Many definitions are given, varying only in that in some of them the parties to such instruments are specified more particularly and the time of payment is stated in different terms, but all agree that in order to constitute a promissory note the instrument must be for a specified sum or certain sum of money. *Lowe v. Bliss*, 24 Ill. 168.

If effect is to be given to the language of this instrument and no part of it is to be rejected, it being quite clear that the addition of the words "and taxes," which must, if they have any meaning at all, refer to the taxes upon the instrument itself or the money loaned and represented by it, the amount of which is not fixed by the instrument nor is there any means found in the instrument by which the amount can be fixed and resort to extrinsic evidence being necessary to fix the same, it necessarily follows that the sum to be paid is uncertain and the instrument is not a promissory note. *Lowe v. Bliss*, *supra*; 4 Am. & Eng. Ency. of Law, (2d ed.) 77; 7 Cyc.

596; *Hill v. Todd*, 29 Ill. 101; *Dorsey v. Wolff*, 142 id. 589; *Agrey v. Fearnside*, 4 M. & W. 168; *Howell v. Todd*, Fed. Cas. No. 6783; *Farquhar v. Fidelity Trust and Safe Deposit Co.* 13 Phila. 473; *Walker v. Thompson*, 108 Mich. 686; *Car-mody v. Crane*, 110 id. 508; *Donaldson v. Grant*, 15 Utah, 231; *Lockrow v. Cline*, 46 Pac. Rep. 720; *Brooke v. Strothers*, 110 Mich. 562; *Garnett v. Myers*, 91 N. W. Rep. 400.

Appellant contends, however, that the word "taxes" is so indefinite and so uncertain, when read in connection with the entire instrument, that it ought to be rejected as surplusage, and in support of that contention refers to *Hoyt v. Jafray*, 29 Ill. 104, *Hill v. Todd*, 29 id. 101, and *Bilderback v. Burlingame*, 27 id. 338. We do not think the cases cited support the contention of appellant. *Lowe v. Bliss*, *supra*, was an action by the payee against the maker of an instrument in the form of a note for the payment of a certain sum of money at the Bank of Kankakee, Illinois, "with current rate of exchange on New York." In that case special counts were filed in the declaration upon the note, but there was an omission to state anything in regard to the provision for the New York exchange. Objection was made to the instrument being admitted in evidence on the ground that there was a variance between it and the declaration, and that objection was overruled. On appeal to this court the judgment of the lower court was reversed, and it was held that the instrument was not a promissory note because of the provision as to current exchange on New York, which made the sum to be paid uncertain, as exchange varied from time to time and in different banks and localities. In that case the note was executed and delivered in New York. In *Hill v. Todd*, *supra*, the note was delivered in Chicago, Illinois, and payable at the office of the payee "in this city," and was for a certain sum of money "with current rate of exchange." In that case it was held that as the note was delivered and payable in Chicago there could be no exchange when paid at the

place where payment was provided for, and that the words "with current rate of exchange" could be rejected as surplusage. *Hoyt v. Jaffray, supra*, was upon an instrument in the form of a note, payable at Miller's Bank, Aurora, Illinois, "with current rate of exchange on New York," and following the case of *Hill v. Todd, supra*, the provision with reference to exchange was held to be surplusage and the instrument a promissory note. In *Bilderback v. Burlingame, supra*, the action was upon an instrument reading: "Due W B. Goddard, \$450.00; to be paid in lumber when called for; in good lumber at \$1.25." That instrument was held to be a promissory note, and it was further held that as against the maker it was not necessary to prove the consideration.

By the statute of Connecticut, if the instrument in question had been a promissory note,—and without the provision to pay taxes it unquestionably would have been,—it was subject to taxation. *Howell v. Todd, supra*, was a case in the United States Circuit Court in Connecticut upon a note very similar to this, and the court there said in reference to the same: "The second ground is that the amount to be paid is uncertain, for it provides for the payment not only of interest, which is certain, but also of taxes, the amount of which must necessarily be uncertain until they are assessed or imposed according to law. The instrument in question quite certainly is not a promissory note."

As has well been said by counsel for appellee, from reading the instrument it is quite as certain what subject the word "taxes" relates back to as the word "interest." The expression is, "with interest at six per cent per annum and taxes." There is a period after "Fourth National Bank," and the expression following is, "Value received, with interest at six per cent per annum and taxes." Of course, from long usage and common knowledge no one would hesitate to interpret the instrument as meaning that the interest should be paid upon the debt

described in the note, and we see no reason for doubting that the intention of the parties was to contract that the maker of the note should pay the taxes on it in addition to the principal debt and interest thereon. The provision in the instrument in *Agrey v. Fearnside*, *supra*, was for a certain sum of money and "all fines according to rule," and it was insisted there, as here, that the words in quotation marks should be rejected as insensible, and therefore mere surplusage. Parke, Baron, delivering the opinion, said: "It is quite possible that they have a meaning and may import that certain pecuniary fines or forfeitures are to be paid by the defendants, and if so, this is certainly no promissory note within the statute, but is a specific agreement to do certain things, the consideration for doing which not being stated, the declaration is clearly bad."

In *Farquhar v. Fidelity Trust and Safe Deposit Co.* *supra*, the instrument provided for the payment of \$5000, "together with all taxes and charges in the nature thereof that may be levied upon this note, or upon the indenture or mortgage accompanying the same or the principal or interest moneys thereby secured, immediately upon their assessment." Speaking of this provision the court said: "Overlooking the clause touching attorney's commission, how can it be said that the notes are either unconditional or certain in amount in view of the stipulation for the payment of taxes, or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property is in the hands of the holders, (and this is the import of the stipulation,) in some places they would probably be free from this charge, while in others they may be subjected to indefinite and varying rates of taxation, so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances and be dependent upon the domicile of the holder. And of these contemplated charges or additions to the nominal con-

sideration the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consideration is thus fluctuating and indefinite and which are laden with such embarrassments to their circulation could not perform the functions, and therefore do not possess the character, of negotiable paper." And so in the case at bar, the instrument sued on provides for the payment of taxes. Whether the taxes shall be paid annually or semi-annually, whether before the note becomes due or after, or at the time of its maturity, is uncertain. By the law merchant, and by the statutes of the States in aid thereof, negotiable instruments occupy a highly useful and valuable place in the commerce and business of our people. There is no other form of contract known that in so few words may contain so many well understood and thoroughly established legal rights and liabilities. Their presence and use are a boon, and to destroy or to materially impair them would be a business calamity. To permit, by strange and unusual provisions, matters in no way relating to or affecting trade or commerce to be incorporated into them unsettles established rules of construction and makes that dangerous and uncertain which before was definite and well understood. We are unwilling to assent to the contention that such instruments can or ought to be construed as negotiable instruments or promissory notes.

Under these views it is unnecessary to discuss other questions urged, as this seems decisive of the case, and the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

NINA L. GILLETT

v.

AMARYLLIS T. GILLETT.

*Opinion filed February 17, 1904.*

1. ADMINISTRATION—*section 77 of Administration act applies though deceased householder was a widow.* Under section 77 of the Administration act, children residing with their widowed mother, who at the time of her death, intestate, was a house-keeper and the head of a family, are entitled to the same articles of property that they would take were such intestate a widower.

2. SAME—*age and financial condition of female child do not affect her right to specific award.* The fact that a female child residing with her widowed mother at the time of the latter's death, intestate, is over eighteen years of age and has an independent fortune does not defeat her right to a specific award under section 77 of the Administration act.

3. SAME—*word "family," used in section 74 of the Administration act, construed.* The word "family," used in section 74 of the Administration act with respect to the widow's right to household furniture and a year's provisions for herself and family, means such persons as constituted the family of the deceased at the time of his death, whether children or servants.

4. SAME—*fact that a daughter contributed towards household expenses does not defeat right to specific award.* That a daughter residing with her mother, by agreement contributed towards the household expenses, does not defeat her right to a specific allowance, under section 77 of the Administration act, where it is shown she sustained close relations of confidence and affection with her mother, who in no sense regarded her as a boarder.

5. ABSTRACT OF RECORD—*when additional abstract of record is unnecessary.* Where appellant's abstract of record sufficiently complies with the rules requiring the same to be an abridgment of the record, in which the evidence is condensed in narrative form so as to clearly present its substance, an additional abstract filed by the appellee which sets out the testimony in full is unnecessary, and its cost will not be taxed to appellant.

*Gillett v. Gillett*, 109 Ill. App. 128, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Logan county; the Hon. J. H. MOFFETT, Judge, presiding.

Mrs. Lemira P. Gillett, who was the widow of John D. Gillett, died testate on September 21, 1901. After her death the appraisers, appointed by the county court in the administration of the estate, set off to the appellee, Amaryllis T. Gillett, a daughter of Mrs. Lemira P. Gillett, an amount, equal in the aggregate to \$2525.00, as a specific separate allowance. The appellant, Nina L. Gillett, filed five objections in the county court to the appraisement so made. The first, fourth and fifth of these objections were withdrawn, and the county court overruled the second and third objections, and approved the appraisement, and the specific allowance, to the extent of \$2475.00, disallowing an item of \$50.00 for family pictures, wearing apparel, jewels and ornaments. The third objection to the allowance to the appellee was, that it was excessive, and the result of a prejudiced and interested appraisement on the part of the appraisers; but this objection has been abandoned, or is not now insisted upon by the appellant in the argument made before this court.

The second objection made to the appraisement was to the effect that the appraisers set off to the appellee, Amaryllis T. Gillett, a total of \$2475.00, as an allowance to her as a female child of Lemira P. Gillett, whereas, as it is alleged in the objection, "she was a daughter of Lemira P. Gillett past forty years of age, of independent fortune, without family and boarding with her mother for a compensation, and had no other or further rights than those of a daughter and boarder in the family; that she is not such a person contemplated by the statute as is entitled to an award against said estate."

Appellant took an appeal from the order of the county court of Logan county, approving the report of the appraisers, to the circuit court of that county. After appeal to the circuit court, the parties waived the intervention of a jury, and submitted the case by consent to the court for trial without a jury. The circuit court upon the trial

affirmed the judgment and order of the county court, refusing to give certain propositions of law asked by the appellant, and giving those asked by appellee. Thereupon, the objector, being the present appellant Nina L. Gillett, took an appeal to the Appellate Court, and the Appellate Court has affirmed the judgment of the circuit court. The present appeal is prosecuted from such judgment of affirmance.

Upon the trial before the circuit court, the appellant asked that court to hold as a proposition of law in the decision of the case, as follows: "If it appears from the evidence that, during the lifetime of Lemira P. Gillett, her daughter Amaryllis T. Gillett, who was about the age of forty-four years, and had an independent fortune in her own right of between \$200,000.00 and \$250,000.00, with a yearly income of between \$12,000.00 and \$15,000.00 per annum, made her home with her mother, occupying no position of dependence upon her mother, then the law is that out of her mother's estate Amaryllis T. Gillett is not entitled to a specific allowance." This proposition was refused by the circuit court. The court, at the request of appellee, held as law in the decision of the case propositions of law to the following effect, to-wit: "That Amaryllis T. Gillett, to whom specific allowance was made, was residing with her widowed mother at the time of the decease of the mother; that, while she was required by the mother to contribute a stated amount annually toward maintaining the household expenses, and sustaining the church organization, to which they belonged, she was never treated as a boarder, and was not such; that she ever maintained toward her mother that same close family relation of mother and daughter that she did, while the father was living, and that her relations were not changed after the father's death; she was in the family as a daughter, to devote her time when at home, and her energies for the comfort and enjoyment of her mother, to aid in supplying the many wants that

will arise in the declining years and in sickness, and the question of age and financial standing does not affect the right of a female person, so standing, to the right to claim a specific allowance."

BLINN & HARRIS, and BEACH, HODNETT & TRAPP, for appellant:

In construing a statute the intention of the legislature should be ascertained, and such a construction given as will carry out the true intention. *Starr & Cur. Stat. chap. 131, sec. 1; Hogan v. Aiken*, 181 Ill. 448.

A thing within the intention is within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention. *People v. Chicago*, 152 Ill. 546; *Castner v. Walrod*, 83 id. 179.

In construing a statute courts are not confined to the words used but may regard the purpose, and, when necessary to give effect to the meaning of the law, words may be rejected and others substituted. *Railway Co. v. People*, 144 Ill. 458; *Perry County v. Jefferson County*, 94 id. 214; *Castner v. Walrod*, 83 id. 179.

In Pennsylvania, where the statute provided that "the widow or child of any decedent may retain either real or personal property to the value of \$300, the same shall not be sold, but suffered to remain for the use of widow and family," it was held, although not limited to minors, not to apply to adult children having independent means of living. *Halby's Estate*, 20 Phila. 117; *Young's Estate*, 3 Pa. Dist. 758; *Barr's Appeal*, 1 Mona. 764.

A similar statute in Alabama was held not to apply to adult children having other means of support. *Child v. Jones*, 60 Ala. 352; *Henderson v. Tucker*, 70 id. 38; *Compton v. Perkins*, 92 Tenn. 715.

The statute providing for so-called widow's allowance was passed to prevent the widow and children becoming a charge upon the eleemosynary institutions of the State. *Phelps v. Phelps*, 72 Ill. 548.

This beneficent act was directed to the objects of the tenderest care of the law, and should not be perverted to purposes or objects not contemplated by its framers. *Veile v. Koch*, 27 Ill. 129.

The words of the statute, "residing with him at the time of his death," should be construed to mean in some dependent relation for support, and not to adults having an independent fortune. See cases cited above.

The words "all females," used in the statute, mean all females under eighteen years of age.

HOBLET & SMITH, for appellee:

Under the provision of section 77 of chapter 3 of the Revised Statutes of Illinois, the child or children of a deceased widow who dies a house-keeper and the head of a family are entitled to the same specific allowance of personal property that they would take if the deceased were a widower. Horner on Probate Law, sec. 13, p. 17; *Leshner v. Wirth*, 14 Ill. 39; *Silver v. Ladd*, 7 Wall. 219.

The benefits of this statute, by its express terms, are conferred upon all female children residing with the deceased at the time of his or her death, without any qualifying words whatever as to age, financial condition or otherwise. To hold otherwise it would be necessary to add to or take from the plain and unambiguous language used. Starr & Curt. Stat. chap. 3, sec. 77, p. 313; *Strawn v. Strawn*, 53 Ill. 263; *Wolford v. Deemer*, 89 Ill. App. 524.

This statute should receive, and has always received, at the hands of the courts of the State, a liberal construction as to the amount to be awarded to its beneficiaries and also as to the class of persons entitled to its benefits. *Strawn v. Strawn*, 53 Ill. 263; *Wolford v. Deemer*, 89 Ill. App. 524; *Veile v. Koch*, 27 Ill. 129.

In fixing the amount of a specific allowance under the statute, regard must be had to the fortune of deceased and to her mode of living and station in life. *Strawn v. Strawn*, 53 Ill. 263; *Wolford v. Deemer*, 89 Ill. App. 524.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The question, presented by this record, relates to the construction, as applied to the facts of this case, of section 77 of chapter 3 of the Revised Statutes in regard to the administration of estates. Section 77 is as follows: "When the person dying is at the time of his death a house-keeper, the head of a family, and leaves no widow, there shall be allowed to the children of the deceased, residing with him at the time of his death, (including all males under eighteen years of age, and all females,) the same amount of property as is allowed to the widow by this act." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 313).

By the literal terms of this statute reference is made to a widower, who is at the time of his death a house-keeper and the head of a family. In *Leshner v. Wirth*, 14 Ill. 39, it was held that the children of a widow, who dies intestate, a house-keeper and the head of a family, shall take the same articles of property that they would take if the intestate was a widower.

John D. Gillett died testate at his home near Elkhart in Logan county in August, 1888, leaving a very large estate, worth more than \$1,000,000.00. At the time of his death he left a widow, Lemira P. Gillett, and four unmarried daughters, to-wit, appellant, Nina L. Gillett, appellee, Amaryllis T. Gillett, (usually called Amy in the family), Jessie D. Gillett, and Charlotte L. Gillett. Two or three years after the death of John D. Gillett, his daughter, Charlotte L. Gillett, was married to Dr. William Barnes, of Decatur. The only other children of John D. Gillett, who were living at the time of the death of Mrs. Lemira P. Gillett, were two married daughters, Mrs. Emma G. Oglesby and Mrs. Katherine G. Hill. The four unmarried daughters lived with their father at the family homestead near Elkhart during his lifetime, and upon his death his wife continued to occupy and live in

the family homestead as her home; and with her these four daughters lived and made their home, she being the head of the family. After her marriage, Mrs. Barnes left the home. The appellant, Nina L. Gillett, left the home about the year 1897, and was abroad for a number of years. In May, 1900, Jessie D. Gillett left the home on account of the conduct of her brother, John P. Gillett, who was then living with his mother. The appellee, Amy T. Gillett, continued to live with her mother up to the time of the latter's death. John P. Gillett died on September 8, 1901, and Mrs. Lemira P. Gillett died in about two weeks thereafter. The appellee, Amy T. Gillett, went abroad in January, 1900, but returned on July 3, 1900, at the request of her mother. After Jessie D. Gillett left the homestead in May, 1900, Mrs. Gillett was alone with her son, John, who owned the homestead under the will of his father. He was addicted to the habitual use of intoxicating liquors, and when under their influence was quarrelsome and abusive. After his sister, Jessie, left the homestead on account of his conduct, and while his mother was left alone with him in the homestead, she expressed a desire that her daughter, Amy, should return from Europe, and appellee accordingly did so, remaining in the homestead from the date of her return on July 3, 1900, up to the death of her mother on September 21, 1901, with the exception of three brief visits away from home made during that time with the consent of her mother, and while her brother was absent. The evidence tends to show that, for more than a year before the death of Mrs. Gillett, the appellee took care of her mother, and of her brother so far as she could, and of the house. She employed, trained and paid the servants; attended to purchasing and paying for household supplies; looked after the linen; superintended the making of the garden; drew checks in her mother's name to make payments of various kinds; superintended the erection and painting of buildings; attended to her mother's wishes in employ-

ing the minister, who had charge of the church built by her mother, and waited on her sick brother.

Mrs. Gillett had an income said to have been from \$15,000.00 to \$18,000.00 per year. Under her husband's will, she had a life interest in some 4000 acres of land, and also a considerable amount of personal property. Each of the children had a large estate inherited from their father. Appellee is admitted to have been worth about \$250,000.00, and to have had an income from her own property of from \$12,000.00 to \$15,000.00 annually. Some sort of an arrangement was made prior to 1897, or about that year, at the suggestion of the son, John P. Gillett, by the terms of which each of the unmarried daughters contributed \$500.00 a year in semi-annual payments of \$250.00 each to their mother towards the household expenses of the home. At her request they each also paid to her \$100.00 per year for the support of the Episcopal church, which she had built.

It is clearly proven that Mrs. Gillett at the time of her death was a house-keeper, and the head of a family, and was a widow; and that appellee, Amy T. Gillett, was her female child, and resided with her at the time of her death. Therefore, under the strict letter of section 77, as above quoted, there was properly allowed to her "the same amount of property [or the money value thereof] as is allowed to the widow by this act." In the first place, it is insisted by the appellant that appellee is not such a child of the deceased, Lemira P. Gillett, as is contemplated by section 77, because she is not under eighteen years of age. The statute does not refer exclusively to females, who are under eighteen years of age. The language is: "There shall be allowed to the children of the deceased, residing with him at the time of his death, (including all males under eighteen years of age, and all females), the same amount of property as is allowed to the widow by this act." The children, who are brought within the terms of the section, include all males

under eighteen years of age and "all females." The fact, that the males to be included are specifically mentioned as being under eighteen years of age, while the words, "all females," are used without any qualification, clearly indicates that the legislature intended to refer to females without reference to what their ages might be. If it had been the intention of the legislature to include only females under eighteen years of age, then the words, "under eighteen years of age," would have been made to qualify females, as well as males.

In the second place, it is claimed that the statute only refers to dependent females, and those, who need the aid of the widow for their support. It is, therefore, claimed that the appellee is not included within the meaning of section 77, because she had an independent fortune, and a large income of her own, and was, therefore, in no way dependent upon her mother. The section does not use the words "dependent females," nor is there any language in the section, which seems to restrict the allowance, there provided for, to dependent females. There is nothing in the statute, which excludes from the allowance female children, who may have had property or incomes of their own.

In ascertaining the meaning of a statute the intention of the legislature is to be sought for. Where terms are ambiguous and doubtful, rules of construction are applied to determine that intention, and statutes *in pari materia* with the statute under consideration are referred to. But where the language of the statute is plain and unambiguous, there is no necessity for resorting to rules of construction, and the statute must have an interpretation according to the plain and ordinary meaning of the words used. "In the enactment of statutes, the rule of interpretation is, in respect to the intention of the legislature, that where the language is explicit, the courts are bound to seek for the intention in the words of the act itself, and they are not at liberty to suppose or to hold,

that the legislature intended anything different from what their language imports." (Potter's Dwarries on Statutes, pp. 144, 146, par. 20). "When, indeed, the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise (and 'those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded.')

\* \* \* The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction." (Endlich on Interpretation of Statutes, p. 6, sec. 4). "Where the language of the statute is plain and explicit, it cannot be controlled by the rule *in pari materia*." (Endlich on Interpretation of Statutes, sec. 53, p. 67). In *Ottawa Gas Light and Coke Co. v. Downey*, 127 Ill. 201, we said: "Courts cannot, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it and enforce it as plainly written." Again, in *Wunderle v. Wunderle*, 144 Ill. 40, we said: "It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity."

By section 77, the children therein named are allowed the same amount of property, "as is allowed to the widow by this act." When we turn to section 74 of the Administration act, we find that the widow is allowed certain articles of property, or their value in money, such as beds, bedsteads, bedding and household and kitchen furniture, necessary for herself and family, and provisions for a year for herself and family. The report of the appraisers in this case mentions each of the specific articles allowed under the proper head, and the value of the same. In passing upon the meaning of the allowance thus made, which is the same as the allowance to be made to the children named in section 77, we held in *Strawn v. Strawn*, 53 Ill. 263, that the statute, providing for an allowance to a widow of such beds, bedsteads, bedding and household and kitchen furniture as might

be necessary for herself and family, and provisions for a year for herself and family, was not to be construed in regard to the character and amount of such allowance, without reference to the circumstances of the parties, but that, in fixing such allowance, the appraisers should take into view the condition and mode of life in which the widow was left by the death of her husband, and should regard, as necessary, that furniture, which is the ordinary and appropriate furniture for such homesteads. In that case we said (p. 274): "It cannot be supposed that the legislature, when it used the words 'necessary furniture,' and 'provisions for a year,' designed to use the words in a rigid and unbending sense, to be construed in all cases without reference to the circumstances of the parties. If that were so, we should be obliged to say that many articles of furniture to be found in all comfortable houses, were not absolutely indispensable, and that the provisions for a year might be reduced to a certain amount of bacon and corn meal. \* \* \* So, too, in regard to the word, 'family.' Inasmuch as the children of the appellee were all of age, although some of them were still members of the maternal family, it is claimed that the provisions allowed should only be such, as would be required for the sustenance of the widow alone. But we are of opinion the legislature intended, by the word 'family,' to include such persons, as constituted the family of the deceased at the time of his death, whether servants, or children, who had attained their majority." It cannot be said that the allowance here made of \$2475.00 was extravagant in view of the size of the estate and of the circumstances of the parties.

It is furthermore claimed on the part of the appellant that, because the appellee contributed \$500.00 per year in semi-annual payments towards the household expenses, as did the other unmarried daughters while they lived with their mother, the appellee thereby became a mere boarder, and that, for that reason, she is not entitled to

the award. We do not think that the contribution, so made towards household expenses, was a compensation for board. Notwithstanding such payment, the appellee constituted one of the private household of her deceased mother. The evidence shows that the homestead, occupied by Mrs. Gillett, was a large house, and had in it upwards of eighteen rooms, and that each one of the daughters above named, before the death of their father and after his death, occupied one room in the house, and had one horse, and had the use of the family carriages. In view of the wealth and position of the family, it can not be said that the small contribution thus made was intended to be an equivalent for board. The design of the statute was "to enable the widow to keep what death had spared of her domestic circle unbroken during that time notwithstanding the loss of her husband." (*Strawn v. Strawn, supra.*) The mere fact, that her children chose to contribute a small sum towards the family expenses, and another small sum towards the support of the church the widow had erected at her own expense upon her premises, did not show that they were boarders in the sense, in which that term is used in the case of *Strawn v. Strawn, supra.*

In *Wolford v. Deemer*, 89 Ill. App. 524, one of the Appellate Courts in this State has held that, where one, at the time of his death, is a house-keeper, and the head of a family consisting of himself and a daughter, and leaves no widow, the daughter is entitled to an allowance out of the estate under section 77; and that this right is not defeated by the facts that the daughter is an adult and a widow; that while her husband was alive she did not live at her father's home; that she returned thereto at her father's request; that he agreed to pay her \$2.00 a week for her services at home; that she owned property, and had an income from other sources; and that she shared equally with her brothers and sisters under her father's will.

It appears from the evidence that Mrs. Gillett, early in the month of July, 1901, and about three months before her death, left her home and went north to Mackinac Island for a summer vacation, and that, when she left home, she left her daughter, the appellee, in charge of the homestead, and handed to her a written order, dated July 1, 1901, which order, signed by Mrs. Gillett, is in the following terms, to-wit: "This is to certify that I leave my daughter, Amy, in full charge of my house, help, and all pertaining to the premises in my absence this year." She directed appellee to draw checks in her name upon her own account in the bank in Elkhart, and those checks were so drawn by appellee and are shown in the record. When Mrs. Gillett went north in July, 1901, she not only left appellee in charge of the house, but also in charge of her son, John P. Gillett, and of the entire household. Moreover, there is some evidence, tending to show that, some time before the death of Mrs. Gillett, she released appellee from the obligation to pay the contribution of \$500.00 towards family expenses. Upon this subject there is some conflict in the evidence, but inasmuch as the trial court saw the witnesses and heard their testimony, we are not disposed to interfere with its finding upon this subject. There are in the record quite a number of letters, some twenty-one in number, written by Mrs. Gillett to appellee, beginning in July, 1898, and ending August 30, 1901, shortly before the widow's death, which show that relations of confidence and affection existed between appellee and her mother. They show that she had full charge of her mother's home during her mother's absence, and was authorized to give directions to servants and nurses, and look after her sick brother, and his room. It clearly appears from these letters, and the other testimony, that she was in the family as a daughter, and bore the same close family relation, as a daughter to Mrs. Gillett, as existed between them while the father was living, thus

devoting her time and energies, when at home, for the comfort and enjoyment of her mother, and it cannot be said that she bore the relation to the household of a mere boarder.

Reference is made by counsel for appellant to authorities in other States, giving the same construction to statutes there, as is contended for on behalf of appellant here. But an examination of the statutes, so construed by such decisions, will show that they differ from the Illinois statute in providing for exemptions in favor of minors, or restricting their benefits to minors. But in *Barr's Appeal*, 1 Monaghan, 768, it is said: "The Act of Assembly gives to the widow, or the children of a decedent, the right to retain \$300.00 out of the decedent's estate. The act fixes no age or circumstances, which shall deprive the children of a right so to claim. This court, in view of the spirit of the law, has held that an adult child, living apart from the father's family, and not dependent on him for support, is not entitled to claim under the statute. Here, the appellee always lived with her father, the decedent, as a member of his family. She continued with him after she arrived at the age of twenty-one, just as she had before. She remained as a child, not as a servant. The language of the act does not bar her claim. The spirit and purpose thereof, in providing this sum for the family, give it to her. She fills the requirement of the statute." Inasmuch as section 77 assimilates the award to the children to that allowed to the widow by the act, and inasmuch as the widow takes without regard to dependence, we are of the opinion that an adult child, like appellee, may take without regard to dependence, where the family relation exists, and where the facts mentioned in section 77 exist.

Appellee has filed herein what her counsel call an additional abstract, and makes a motion that the cost and expense of the additional abstract, so filed by appel-

lee, be taxed as costs against appellant. This motion is denied. What is called an additional abstract is in fact a copy of the testimony, printed in full, of all the witnesses, who testified upon the trial, except one. The abstract, required by the rules of this court, is an abridgment of the record, and in it the evidence should be condensed in narrative form, so as to clearly and concisely present its substance. We think that the abstract, filed by the appellant, complies with the rule, and that the additional abstract, if it may be so called, filed by the appellee, was not necessary.

For the reasons above stated, we are of the opinion that the allowance made by the circuit court was proper. And accordingly the judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

*Judgment affirmed.*

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THE CITY OF ALTON

v.

SOPHIA M. FOSTER, Exrx.

*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*section 61 of Practice act does not authorize Supreme Court to review facts.* Notwithstanding the parties to a suit at law agree that the court shall try all matters of law and fact without a jury, under section 61 of the Practice act, the judgment of the Appellate Court is conclusive of all controverted facts.

2. SAME—*propositions of law should be submitted though case is tried, by agreement, without a jury.* In order to raise questions of law for review on appeal to the Supreme Court from the Appellate Court in a suit at law, other than such questions as arise during the trial by rulings on pleadings, evidence and the like, propositions of law must be submitted, notwithstanding the parties try the case, by agreement, without a jury, under section 61 of the Practice act.

3. SAME—*effect of section 61 of Practice act.* The only effect of section 61 of the Practice act, concerning trials, by agreement, before the court without a jury, is that an exception taken to the final judgment has the effect to save for review all rulings of the court upon questions of evidence and upon propositions of law to

207	150
e114a	82
114a	*449
207	150
115a	*409

which exceptions were taken during the progress of the trial, without the necessity of a motion for new trial.

4. EVIDENCE—*stipulation on a former case not admissible in evidence.* Upon the trial of a suit at law without a jury, upon a stipulation of the facts, a stipulation of facts used on the trial of a former case between the parties which had been finally determined is not admissible, but its admission will not reverse where it contains nothing more than the stipulation in the case on trial.

5. MUNICIPAL CORPORATIONS—*when city is not liable for balance on public contract.* A contractor who agrees, under a provision of the improvement ordinance in conformity with the statute, to make no claim upon the city for the portion of the cost of the improvement to be raised by special assessment, cannot hold the city liable in assumpsit for a deficit in such assessment, although the city refuses to levy a new assessment to supply such deficit, which arose from the holding of the former assessment void, as to the property objected for, upon the ground that the ordinance was invalid, the contractor's remedy in such case being *mandamus*.

*City of Alton v. Foster*, 106 Ill. App. 475, reversed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. M. W. SCHAEFER, Judge, presiding.

This is a suit in assumpsit, brought to the March term, 1900, of the Madison county circuit court by Robert F. Foster against the city of Alton. Foster has since died, and his executrix, Sophia M. Foster, prosecutes this suit. The action is for the recovery of a balance alleged to be due the plaintiff from the city for the construction of a certain sewer. Trial was had before the court, without a jury, under section 61 of chapter 110 of the Revised Statutes of Illinois.

The ordinance for the improvement was set out in the declaration, section 7 thereof being as follows:

"Sec. 7. Said contract shall contain, among other things, a covenant in substance to the effect that the contractor or contractors shall have no lien upon the city in any event, over and above the amount hereinbefore provided to be raised for said improvement by general taxation, if any, except from the collection of the

special assessment ordered to be levied, assessed and collected by the city council for said improvement."

The contract between the plaintiff and the defendant was also set out in the declaration and contained the following: "The said party of the first part further agrees to make no claim against the city in any event, except for the city's share of the cost of the sewer, as above specified, and from the collection of the special assessments ordered to be collected for said improvements, and agrees to take all risks of invalidity of special assessments. The city shall in no event be liable by reason of the invalidity of said special assessments or of the proceedings therein, or for a failure to collect the same: *Provided, however*, that in case said assessments, for any cause whatever, be declared invalid and void, the city hereby agrees to make a new assessment to pay for said improvements."

The declaration further avers, that under the direct supervision of the city engineer and committee on sewage, Foster constructed, according to the ordinance and contract, a sewer along Second street, from a sewer in Piasa street to the junction of Third street and Second street; that by the order and under the direction of the city engineer and committee he connected said sewer with the sewer in Piasa street and with a sewer at the junction of Second and Third streets, which extended along Second street, and that the sewer so constructed was accepted by the city; that the city filed its petition in the county court against the property abutting on Second street from the east line of Piasa street to the west line of Ridge street, asking that the cost of the sewer mentioned in said ordinance should be assessed in the manner prescribed by law, and such proceedings were thereupon had in said county court that commissioners were appointed by said county court to make such assessment, and said commissioners, having duly qualified, made and reported to said court such assess-

ment, and afterwards, at the August term, 1892, of said county court, the owners of certain pieces of said property so assessed filed objections to the confirmation of said assessment, and said county court rendered judgment at its October term, 1892, sustaining said objections, and thereupon said city of Alton appealed from said judgment to the Supreme Court of the State of Illinois, and afterwards, on the 16th day of October, 1895, the Supreme Court affirmed said judgment of said county court and held the assessment null and void; that on the 29th day of March, 1896, Foster instituted an action of assumpsit against the city to recover the balance of \$1245.65 due him for the construction of said sewer, basing his action on the allegation in his declaration that the ordinance was void and that no valid assessment could be made under it; that the city filed its plea to the declaration, in which it averred that since the assessment was held invalid it has stood ready and willing to make and levy a new assessment for the balance, and to do all things necessary and proper to collect from the property owners along the line of said improvement such sum or sums as may be required; that upon the trial of said cause the circuit court rendered judgment in favor of Foster for \$1245.65, the balance due him; that the city appealed to the Appellate Court, where the judgment was reversed; that Foster then appealed to the Supreme Court, where the judgment of the Appellate Court was affirmed, on the ground that although the assessment was invalid the ordinance was not void, and that the city might make a valid assessment, as in its plea it had declared its willingness and readiness to do. The declaration further avers that after the decision of the Supreme Court holding that the city had the power to make a valid assessment to pay the balance due, Foster repeatedly and urgently petitioned and requested the city to provide a new and valid assessment, but that it has failed and refused to do so.

The city pleaded non-assumpsit and the Statute of Limitations. No demurrer was interposed to the declaration, nor were any propositions to be held as law submitted by either party. Plaintiff obtained judgment in the circuit court, which judgment, on appeal to the Appellate Court, was affirmed, and defendant prosecutes this appeal.

The errors assigned are: First, the circuit court erred in admitting improper evidence on the part of the plaintiff; second, the judgment is contrary to the law and the evidence; third, the circuit court erred in rendering judgment in favor of the plaintiff and against the defendant when by the law the judgment should have been in favor of defendant, and appellant therefore prays the judgment of the circuit court be reversed.

ALEX W. HOPE, and B. J. O'NEILL, for appellant.

LEVI DAVIS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

The bill of exceptions in this case contains the following recital: "It was agreed by the parties that a jury be waived and the issue tried by the court under section 61 of chapter 110 of the Revised Statutes of Illinois," and under this stipulation appellant contends that all matters of law and fact are, by virtue of the provisions of said section 61 of the Practice act, open for review by this court. Appellee does not controvert the position of appellant upon this question of practice, and it is therefore plain that counsel on each side of this case misapprehend the scope and application of said section so relied upon. Said section is as follows: "Exceptions taken to decisions of the court, upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court, and in appeal cases, tried by the court without the intervention of a jury, shall

be deemed and held to have been properly taken and allowed, and the party excepting may assign for error, before the Supreme Court, any decision so excepted to, whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and evidence."

While the language of this section is broad, it must be construed with sections 42 and 90 of the Practice act as found in Hurd's Statutes of 1899. Section 42 provides: "In all cases, in any court of record of this State, if both parties shall agree, both matters of law and fact may be tried by the court; and upon such trial either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write, 'refused' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." By section 90 it is provided: "The Supreme Court shall re-examine cases brought to it by appeal or writ of error as to questions of law only, and no assignment of error shall be allowed which shall call in question the determination of the inferior or Appellate Courts upon controverted questions of fact in any case, excepting those enumerated in the preceding section."

The cases enumerated in the preceding section are criminal cases; cases involving a freehold, franchise, the validity of a statute or construction of the constitution, and cases relating to the revenue, in which cases the appeals lie directly to this court. In cases coming from the Appellate Court to this court, such as the case at bar, the finding of that court is conclusive upon this court upon all matters of fact, and by section 90 this court is precluded from considering any question other than questions of law, and it has been uniformly held by this court that outside of the questions arising during the progress of the trial upon the rulings of the court,

upon the pleadings, the admissibility of evidence, and such matters, questions of law can only be preserved and presented to this court, when the trial is before the court without a jury, by written propositions, as provided for in section 42 of the Practice act. As early as 1881, in the case of *Tibballs v. Libby*, 97 Ill. 552, this question was fully considered without making special application to section 61, and it was there held that questions of law could only be preserved by the submission of written propositions, and such has been the holding through a long line of cases to the present time. *American Exchange Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 547; *Commercial Nat. Bank v. Cauniff*, 151 id. 329; *Barber v. Hawley*, 116 id. 91; *Hardy v. Rapp*, 112 id. 359; *Farwell & Co. v. Shove*, 105 id. 61; *Swain v. First Nat. Bank*, 201 id. 416.

Appellant, however, very earnestly contends that this court has placed on this section 61 the construction now contended for, and cites *Jones v. Buffum*, 50 Ill. 277, *Sands v. Kagey*, 150 id. 109, *Bailey v. Smith*, 168 id. 84, and *Union Ins. Co. v. Crosby*, 172 id. 335. In *Jones v. Buffum*, *supra*, the question arose upon the contention of the appellee that the bill of exceptions did not preserve the motion for a new trial, and that it was not shown that any exception was taken to the decision of the court overruling such motion, and in passing upon the case, *Metcalf v. Fouts*, 27 Ill. 110, was referred to by the court and quoted, as follows: "In *Metcalf v. Fouts*, 27 Ill. 110, it was urged the appellant could not assign error on the judgment because no reasons for a new trial were filed in the circuit court. This court said: 'Under the twenty-second section of the Practice act parties are authorized to assign error on the final judgment, upon both the law and the evidence, in cases of trial by the court without a jury, and if error could not be assigned for overruling a motion for a new trial in such case, yet as error may be assigned on the final judgment there can be no force in the objection, the court, under that section, being au-

thorized to consider both the law and the evidence and determine whether error has intervened in rendering the judgment.'" Both of those cases were decided before the creation of the Appellate Courts, and as this court at that time was authorized and required to consider appeals both in matters of law and evidence, there may be found in those opinions remarks that would lead counsel to infer that all that was said was in the construction of what was then section 22 of the Practice act and is almost identical with our present section 61. The substantial point decided in both of those cases was, that where a case was tried, by consent, by the court, without a jury, both matters of law and fact being submitted to the court, no motion for a new trial was necessary, but if exceptions had been taken to the decision of the court and exception to the judgment taken and noted, then all exceptions so taken should be deemed to have been properly taken and allowed, and the party excepting might assign for error any decision so excepted to.

*Sands v. Kagey, supra*, was an action of ejectment upon an agreed state of facts, which being appealed to this court, the same contention was made as in the case of *Metcalf v. Fouts* and *Jones v. Buffum, supra*, as stated in the opinion (p. 114): "The bill of exceptions does not show that the defendants excepted to the decision of the court overruling a motion for a new trial, and it is claimed that this court, in the absence of that fact from the bill of exceptions, will not review the decision of the circuit court." Section 61 of the Practice act is then set out, and the court states that under this statute no motion for a new trial was required. It must be borne in mind that the *Sands case*, being an ejectment suit, was one that came directly to this court, and in which the court had authority to investigate both questions of law and fact, so far as they were presented by the record.

*Bailey v. Smith, supra*, was also an action of ejectment which came directly to this court, and all that was de-

cided in that case was, that because there were no exceptions to the finding and judgment of the court, upon which matters, only, were errors assigned, we could not consider the same.

*Union Ins. Co. v. Crosby, supra*, was an action of assumpsit. It appeared from the record in that case that no exception was taken to the judgment, but there was a motion for a new trial, which was overruled but exception not taken to the overruling of such motion. It was insisted by appellant in that case that making a motion for a new trial was equivalent to excepting to the judgment, and this court held that it was not, and that there was nothing before the court for consideration.

The only practical effect, as far as we are able to see, to be given to said section 61 is, that by its provisions a motion for a new trial becomes unnecessary; that if proper exceptions be taken during the progress of the trial, whether those exceptions be to the exclusion or admission of testimony or to the holding of the court upon propositions of law submitted by the parties, if exception be taken to the entry of the final judgment all the questions are saved, and assignments of error may be made upon them as though a motion for a new trial had been made in those cases tried before a jury. In the case at bar proper exception was taken to the entry of judgment, but, under the views herein above expressed, the only question open for our consideration, so far as relates to the proceedings of this trial, is the alleged error in the admission of certain evidence offered by appellee.

It appears that upon the trial of this case a stipulation of facts that had been made and used in the trial of the former case between the same parties, but which had been finally determined, was admitted in evidence in the case at bar on the offer of appellee and over the objections of appellant. This was improper, and if the evidence was of such character that it could be said that the appellant was injured thereby the case should be re-

versed. But upon looking to the agreement it contains no more than the stipulation in the case at bar. It is practically agreed, by express stipulation, the declaration in this case truly states the case, and the matters that were offered and covered by the former stipulation added nothing material to the statements made in plaintiff's declaration in the present suit.

Objection is also made to the testimony of certain officers of appellant with reference to the completion and acceptance of the work. The extent of the authority of these officers and the recognition of their acts by the city were not wholly questions of law, but were mixed questions of law and fact, and we think the evidence was properly submitted to the court, that he might determine that, although the work may not have been done in its entirety and according to the original contract, whatever deviation there was from the contract was not at the instance and request of appellant or by its express consent.

The only remaining question that we are permitted, under the views that we entertain of this record, to consider, is whether the declaration in this case states a sufficient cause of action to sustain the judgment. By excepting to the judgment this question was preserved. 8 Ency. of Pl. & Pr. 197; *Chicago and Alton Railroad Co. v. Clausen*, 173 Ill. 100.

As has been seen, the declaration, by proper averments, sets out the ordinance for the improvement in full, the contract between the parties, and the former judgment of this court holding that the ordinance for the improvement in question was not void but only defective, and that a supplemental or new assessment could be made upon the same. The ordinance contained the provision that the contract that should be made with the appellee should contain "a covenant in substance to the effect that the contractor or contractors shall have no lien upon the city in any event, over and above the amount hereinbefore provided to be raised for said im-

provement by general taxation, if any, except from the collection of the special assessment ordered to be levied, assessed and collected by the city council for said improvement." This provision of the ordinance was but the city's declaration of the requirement of the statute as declared by section 49 of article 9, chapter 24, (Starr & Cur. Stat. 1896,) wherein it is provided: "All persons taking any contracts with the city or village, and who agree to be paid from special assessments, shall have no claim or lien upon the city or village in any event, except from the collections of the special assessments made for the work contracted for." And the contract between appellee's intestate and appellant contained the express stipulation that the contractor would "make no claim against the city in any event, except for the city's share of the cost of the sewer, as above specified, and from the collection of the special assessments ordered to be collected for said improvements, and agrees to take all risks of invalidity of special assessments. The city shall in no event be liable by reason of the invalidity of said special assessments or of the proceedings therein, or for a failure to collect the same." All these matters, except the statutory provision, appear from the declaration. It also appears from the declaration that recovery is not sought for any portion of the fund that was by the provisions of the ordinance to be paid by the city from general taxation, but that the money sought to be recovered is a deficit arising from the failure and inability to collect portions of the special assessment upon the property benefited, because such assessments were declared illegal and void by the county court upon objections there made, and the same objections were sustained by this court upon appeal. *City of Alton v. Middleton's Heirs*, 158 Ill. 442.

The ground of recovery insisted upon is the neglect and refusal of the city council of the appellant city to levy and collect, or make some effort at least to do so, a

new or supplemental special assessment upon the property benefited to meet the deficit above mentioned. The question is, then, for the first time directly presented to this court, whether, under an ordinance and contract and the statute, all providing that the city shall not be liable to the contractor for the amount to be raised by special assessment, the city may nevertheless be held liable for such deficit upon the ground that its officers and agents have neglected or refused to levy such special assessment. No reason is suggested why the city might not, by the ordinance, provide for the exemption claimed, or that the contractor has not made a valid and binding contract upon a sufficient consideration, or that there is any public policy or constitutional inhibition against the restriction of the right as found in the statute quoted, but, notwithstanding the plain language of the ordinance, the contract and the statute that the city shall not be liable for such special assessment in any event, it is sought to read into the contract an exception to the terms and provisions of the ordinance, the statute and the contract itself not there contained, and to declare that there is an event that may arise, and has arisen,—namely, the failure and refusal of the city council to proceed to levy the new assessment,—by which the appellant city becomes liable.

The inauguration of the system of local improvements by special assessments was doubtless designed to enable localities requiring them, and able to build and pay for the same, to have improvements not common or general to the city, and for which the city generally would not need to incur an obligation or direct liability. From such local improvements the citizens generally, and those remote from the improvement, receive little or no benefit, and usually the portion that the public pays for by general taxation is at the street intersections and the places exclusively the property of the public and not bounding the property of any individual, and, as at present, the

cost of the proceedings and collection of the assessment; and it would seem to be an injustice to the public or general tax-payers of the city if the municipality and the contractor could by some act as between themselves, or by the failure of the one or the other to do some act required by the contract or the law, render the general tax-payers, or the general fund of the city, which is derived from the general tax-payers, liable upon a contract for which the city was not primarily liable and which it was expressly agreed it should not be liable for in any event. It must be apparent that if such rule be adopted such municipalities may become the easy prey of negligent or corrupt councils, and under the guise and form of local improvements by special assessments such improvements may be made in such localities as favoritism or other motive may direct, and the feigned or actual neglect or obstinacy of the official representatives of the municipality place upon the city the entire burden of the cost thereof.

When the former case involving the same matters in controversy here was before this court, we held that the ordinance was not void and that a proper assessment could be levied under it, (*Foster v. City of Alton*, 173 Ill. 587,) and with that declaration of this court of the sufficiency of the ordinance to support a further or supplemental assessment, there can be no question but that the particular fund which, by the terms of the contract of the parties, was to pay the claim now sought to be recovered, could have been availed of by appellee by the writ of *mandamus*, as was held in a case almost identical to the one at bar in all its features, viz., *People v. City of Pontiac*, 185 Ill. 437, and we now hold that *mandamus* was appellee's proper remedy.

The case last above cited, in its history, is very similar to the case at bar, and is interesting. The Talbot Paving Company sued the city of Pontiac in *assumpsit*, in the United States circuit court for the Northern Dis-

trict of Illinois. The ordinance and contract were almost identical in terms with those in the case at bar. The declaration stated as the ground of action against the city its failure to collect the special tax, and assigned as a reason therefor, in the first instance, the prosecution of appeals by the lot owners, and the holding of this court that said ordinance was invalid and that it was impossible to collect said special tax from the property liable to pay the same, citing *Bradford v. City of Pontiac*, 165 Ill. 612; and it further alleged, that after this decision the Talbot Paving Company presented its petition to the city council for the adoption of a supplemental ordinance for the assessment of a special tax upon the property contiguous to said improvement to pay the balance due, but the city council negligently and willfully refused and failed to make provision to that end, whereby the right of action was claimed. The circuit court rendered judgment for the paving company, and on appeal to the circuit court of appeals of the seventh circuit the judgment of the circuit court was reversed upon the ground that the declaration stated no cause of action, and in a very clear opinion the court holds that the action of assumpsit will not lie and that the proper remedy is by a *mandamus*. (*City of Pontiac v. Talbot Paving Co.* 94 Fed. Rep. 65.) Following that decision, a *mandamus* case for the same purpose, as is stated above, was brought and the writ ordered by this court.

Appellee cites and relies upon *Maher v. City of Chicago*, 38 Ill. 266, *City of Chicago v. People*, 48 id. 416, *City of Chicago v. People*, 56 id. 327, and *Foster v. City of Alton*, 173 Ill. 587. These cases were all cited and distinguished in the case of *Village of Park Ridge v. Robinson*, 198 Ill. 571, which was another case upon precisely the same contract as is in the case at bar, but was for the building of a sidewalk under the act of 1875. The work was done in accordance with the terms of the ordinance and contract, but in that case the ordinance for the work was

held wholly void, and the *Maier case*, *supra*, was relied upon as authority for the proposition that in such case the action of assumpsit would lie against the village and it would be required to pay the amount out of its general fund. There, as here, the contractor had agreed to make no claim against said village in any event, except from the collection of special taxes made or to be made for the said improvements, and to take all risks of the invalidity of said special taxes, or any of them, or of the proceedings therein, or for failure to collect the same, and this court held that under such contract, although the ordinance was void, the contractor could not recover against the city, and that the case of *Maier v. City of Chicago*, *supra*, was not controlling.

*City of Chicago v. People*, 48 Ill. 416, above mentioned, was an application for a writ of *mandamus* against the city of Chicago to compel payment for a local improvement out of the general fund of the city, which by the contract was to be paid for by special assessment, and was not an action of assumpsit. The circuit court granted the writ, but this court reversed the case on the ground that the contract provided that the contractor should be paid from the assessment then levied and to be thereafter levied, and that the evidence disclosed that the city was already proceeding to make the new assessment, and that the writ should be denied.

*City of Chicago v. People*, 56 Ill. 327, was a proceeding in *mandamus* to compel payment to the relators for a certain local improvement. In that case there was a stipulation that if the court should find the city was liable in any form of action the judgment should go for the relator. The contract was that the relator should be paid by special assessments levied or to be levied, but there was no express provision that the city should not be liable in any event. A special assessment was made, which proved insufficient, and there was at that time no provision of law for making supplemental assessments,

and the court in that case, following the case of *Maier v. City of Chicago*, *supra*, held that as the city had contracted to pay with an assessment it could never make, therefore it would be liable for the balance over the assessments collected for the improvement.

The *Foster* case, which was the former case about the matter now before the court, would seem to be in support of the present view of the court, instead of the contention of appellee. It was not said there, as seems to be the view of counsel, that the city would be liable in this action of assumpsit if it failed or refused to make the assessment, but the contention of Foster, who was the appellant there, was that the ordinance was absolutely void, and that being so, the city was liable under the rule announced in *Maier v. City of Chicago*, *supra*, and *City of Chicago v. People*, 56 Ill. 327. This court denied that contention and held that the ordinance was not absolutely void, and as the Appellate Court, in its special findings of fact, found that the city, at the time the suit was brought, was proceeding and taking the initial steps to make an assessment, the judgment of the Appellate Court reversing the judgment of the circuit court in favor of Foster was affirmed by this court.

The views herein expressed find support in *People v. City of Syracuse*, 144 N. Y. 63; *Fletcher v. City of Oshkosh*, 18 Wis. 228; *City of Greencastle v. Allen*, 43 Ind. 347; *Reock v. Mayor of Newark*, 33 N. J. L. 129; *McEwan v. City of Spokane*, 16 Wash. 212; *Northwestern Life Ins. Co. v. City of Aberdeen*, 20 id. 102.

Under the views above expressed, the declaration in this case must be held so insufficient that it cannot support the judgment rendered for appellee.

The judgments of the circuit and Appellate Courts are therefore reversed and the cause remanded to the circuit court for further proceedings in conformity with the views herein expressed.

*Reversed and remanded.*

## THE SECURITY INSURANCE COMPANY OF NEW HAVEN

v.

CATHERINE KUHN.

*Opinion filed February 17, 1904.*

1. **INSURANCE**—*when plaintiff holds a title in fee simple for purpose of insurance.* A widow who takes an equitable life estate as devisee and the legal title as executrix and trustee has a fee simple title within the meaning of an insurance policy requiring such ownership, even though the property in her hands, or the proceeds of the insurance, are impressed with a trust which a court of equity may compel her to execute.

2. **TRUST**—*cestui que trust acquires no property, in law, while trust subsists.* A *cestui que trust* acquires no property, in law, so long as the trust subsists, however he may be regarded in a court of equity.

3. **SAME**—*title of trustee is commensurate with powers given.* The title of a trustee is commensurate with the powers given, and will consist of a fee simple title if the powers and duties imposed by the will cannot otherwise be exercised.

*Security Ins. Co. v. Kuhn*, 108 Ill. App. 1, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. W. BURKE, Judge, presiding.

BATES, HARDING & ATKINS, for appellant.

WILLIAM M. & WILLIAM S. JOHNSTON, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee brought this suit in assumpsit in the circuit court of Cook county upon a policy of fire insurance for \$1250, issued to her by appellant on a building located at No. 140 North Union street, in Chicago, which had been destroyed by fire. The policy contained a provision that it should be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned

by the insured in fee simple." The defense was that the interest of plaintiff in the property insured was not that of unconditional and sole ownership, and that the ground on which the building was situated was not owned by her in fee simple. A jury was waived and the cause was submitted to the court upon an agreed statement of facts, together with the testimony of witnesses called and examined by the respective parties.

Plaintiff held title under the will of her deceased husband, Frank Kuhn, and the nature of her estate being purely a question of law, the defendant submitted written propositions, requesting the court to hold that the plaintiff was not the unconditional and sole owner of the property insured nor the owner in fee simple of the ground on which the building was situated, but, on the contrary, held only a life estate in such property, and upon her death the title was to vest in others, and therefore the policy was void. Another proposition which the court was asked to hold was, that there could be no recovery except for a share of the value of plaintiff's life estate proportionate to the whole insurance on the property. The court refused to hold these propositions as the law, but found the issues for plaintiff and entered judgment for the full amount of the policy. The Appellate Court for the First District affirmed the judgment.

The provisions of the will of plaintiff's husband, Frank Kuhn, under which she derived title, are as follows:

*"Second—*All the rest and remainder of my estate remaining after the payment and discharge of said debts, real estate as well as personal, and mixed estate and property, I give, devise and bequeath to my executors hereinafter named, in trust, however, only to and for the use and purposes hereinafter mentioned. And for the purpose of facilitating the winding up and settlement of my estate and promoting the interest of my devisees, I do hereby fully empower and authorize my said executors, and the survivor of them, to let, sell, exchange,

encumber, convey all, each and every part or portion of my real and personal property, and the proceeds of such sales or other disposition of the same, or any part thereof, again, in their discretion, to re-invest in the purchase of other real or personal estate, or in bonds, stocks or other securities, or to lend the same at interest upon real estate or other securities, as may by them be deemed most advisable, and the property and estate so acquired with such proceeds again to hold under the same restrictions and for the same uses and purposes hereafter particularly set forth, namely: The real and other estate herein above to my said executors given, devised and bequeathed, is to be held by them and the survivor of them in trust: First, to and for the exclusive use and enjoyment thereof, during the term of her natural life of my wife, Katharina, provided she shall so long remain my widow and unmarried, who is to have and retain the exclusive possession, use, enjoyment and control thereof, and shall have the use, enjoy the same and each and every the income, rents, profits and proceeds arising therefrom, as long as she shall remain unmarried after my death, to and for her own use and behoof. Should my said wife, however, marry again after my death, then, upon such re-marrying, the operation of the above provision in her favor shall at once cease and be of no further effect, and she shall thereby become and be entitled only to such dower in my real estate then remaining unsold or undisposed of, and other portion in my other estate, as she would in law be entitled to if I died intestate. Upon the re-marriage or death of my said wife the trust estate hereby created shall at once cease, and the trust property shall thereupon go to and the title to the real estate become vested in my children, as the whole of my estate remaining unconsumed and constituting such trust fund shall be divided equally between them, share and share alike; and if, in the meanwhile, any one or more of my children shall have died, leaving a descend-

ant or descendants, such deceased child's share shall go to his or her issue, descendant or descendants."

By the will the plaintiff and Emil Kuhn, her son, were appointed executors, but Emil Kuhn refused to act and plaintiff qualified and acted as executrix. The will was admitted to probate on June 30, 1890. An agreement was entered into by plaintiff and her children on March 9, 1896, by which the management of the estate was transferred to the Security Title and Trust Company, which was authorized to make leases of the property in the name of the plaintiff, as executrix; to receive all rents, paying out of the same taxes, assessments, insurance and repairs, and to pay the net income to plaintiff. In case of a sale of a portion of the real estate in order to give the plaintiff a comfortable support, the proceeds were to be received by the trust company and invested and the income to be paid to the plaintiff. The title was not affected in any way by the agreement. Plaintiff was advanced in years, and the agreement merely committed the management of the property to the trust company to be exercised in her name.

The object of the stipulation in the policy was to protect the defendant against taking risks beyond the value of the interest insured, so that the insured would use all reasonable precautions to avoid the destruction of the property. It is not claimed that plaintiff did not have an insurable interest in the property, but it is insisted that her interest was only a life estate, which at seventy years of age was but a small share of the whole value. The question whether she had a mere life estate or a fee simple depends upon the construction of the will. That instrument did not give a mere power or authority over the real estate to the executors, but devised the entire estate, real and personal, to them. The devise was in trust, with power to lease, sell, exchange, encumber and convey all, each and every part or portion of the same, and to again, in their discretion, re-invest the proceeds,

or any part thereof, or to lend the same, and to hold the property and estate acquired with such proceeds in trust for the exclusive use and enjoyment of plaintiff, so long as she should remain unmarried after the testator's death.

Upon her re-marriage or death the provision in her favor was to cease, and the whole of the estate remaining unconsumed and constituting the trust fund was to be divided equally between the testator's children, and if any one or more of such children should have died, leaving a descendant or descendants, the deceased child's share was to go to his or her issue, descendant or descendants. Emil Kuhn having refused to act as executor and plaintiff having accepted and qualified, the estate devised to the executors passed to her.

The provision of the will that the estate so devised should be held for the exclusive use and enjoyment of the plaintiff during life or until re-marriage, and that she was to have and retain the exclusive possession, use, enjoyment and control thereof, and have the use and enjoy the same and each and every the income, rents, profits and proceeds arising therefrom, if considered alone, would amount to a passive trust, executed by the Statute of Uses. By a prior provision, however, active duties were imposed upon the plaintiff, as executrix, as to the leasing, sale, exchange or other disposition of the property, and the investment, re-investment and management of the trust estate. But the precise character of the trust, in its different aspects, is not material in this case, since the estate for life, of whatever nature, and the estate devised to the executors, united in the same person. The entire legal estate became vested in the plaintiff. If she had an equitable life estate she also had the legal estate, as executrix and trustee. A *cestui que* trust acquires no property, in law, so long as the trust is subsisting, however he may be regarded in a court of equity. His estate is an equitable one, and equitable estates are such as are recognized and pro-

tected in courts of equity, and rest on beneficial ownership and the right to the use and income. The legal right and legal estate were in the plaintiff, and she would be the proper one to bring an action at law concerning such estate. The title of a trustee is commensurate with the powers given and the duties imposed upon the trustee, and in this case such powers and duties could not be exercised unless the plaintiff took a fee simple title. She could not sell and convey the fee unless she had the fee. She was not invested with a mere power over the fee, but took a fee simple title by the devise. (*Kirkland v. Cox*, 94 Ill. 400; *Preachers' Aid Society v. England*, 106 id. 125; *Green v. Grant*, 143 id. 61; *King v. King*, 168 id. 273; *Lawrence v. Lawrence*, 181 id. 248.) There was a future contingency in the unconsumed portion of the trust property existing at the death of the plaintiff, which might be in the form of real or personal property. That interest was limited upon the death of the plaintiff or the uncertain event of her re-marriage, and to dubious or uncertain persons who should be living and able to take the property at her death. It cannot be known who, if any, will be the surviving child or children, or the issue or descendant of any such child, to receive the future contingent interest. No one has a present vested estate or insurable interest except the plaintiff. In the action at law she must be regarded as the sole and unconditional owner in fee simple, although the property in her hands or the proceeds of the insurance are impressed with a trust which a court of equity will compel her to execute.

There was no error in refusing to hold the propositions of law as requested.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

FRANK E. GOULD

v.

THE MAGNOLIA METAL COMPANY.

207	172
113a	*180
114a	*280

*Opinion filed February 17, 1904.*

1. EVIDENCE—*effect of section 34 of Practice act.* The only effect of failing to deny, under oath, the execution of a contract, as provided in section 34 of the Practice act, is to make the contract admissible without proof of execution, and does not preclude introduction of evidence explanatory of the meaning of the contract, which is set out in *hæc verba* in the declaration.

2. SAME—*all writings evidencing same agreement are admissible.* If an agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract, and all writings executed at the same time and relating to the same subject matter are admissible.

3. SAME—*what admissible in justification of discharge of plaintiff from employment.* Under a provision of the contract under which plaintiff, a traveling salesman, was discharged from employment, providing for such discharge in case of plaintiff's neglect of duty or any conduct on his part reflecting discredit upon his employer or its business, proof that he habitually associated with disreputable people is competent, as tending to justify his discharge.

4. CONTRACTS—*when letter and conversation are part of a contract.* If an employee, in making a contract of employment, desires the conditions for terminating the contract shall not be specifically stated therein on account of their offensive nature, but prefers to write a letter agreeing thereto, the letter, and a conversation to which the letter refers as a basis of the agreement, are part of the contract.

5. SAME—*when condition of contract is valid.* A party employing a married man to act as traveling salesman may make it a condition of the employment that the employee shall not associate with a certain woman to whom he owes no legal obligation.

6. INSTRUCTIONS—*when party cannot complain of instruction.* The plaintiff in an action for breach of contract cannot complain that defendant's instructions submitted the question of what was sufficient legal ground for discharge, under the contract, to the jury, where his own instructions submit the same question for decision.

*Gould v. Magnolia Metal Co.* 108 Ill. App. 203, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

IRA W. & C. C. BUELL, and P. H. BISHOP, for appellant.

WING & WING, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is a suit in assumpsit, brought by appellant in the circuit court of Cook county for damages resulting from an alleged breach of a contract hiring appellant as salesman and representative of appellee for one year from December 1, 1899, at \$5000 per annum. The contract was in writing and contained the following paragraph:

*"Seventh—*It is further understood and agreed that the party of the first part shall have the right to end this agreement at any time for neglect of duty, willful disobedience of instructions, or for any conduct on the part of the party of the second part that would reflect discredit on the party of the first part or be injurious to their business interests or reflect discredit upon their methods of conducting business."

Appellee is the party of the first part to the contract, and discharged appellant April 21, 1900, by means of a letter written from New York. The letter stated that appellant was discharged in accordance with said provision of the contract, and assigned as reasons for the discharge that he had neglected the business of appellee while at Boston; that he had given offense to customers; that he had passed much time in company with disreputable women, and had renewed and maintained relations with a certain woman with whom he had formerly associated in Pittsburg; that he had brought her to Boston and introduced friends of appellee to her, and had taken her to Portland and elsewhere, maintaining the same relations with her as he formerly did at Pittsburg, and that such conduct was injurious to appellee's business interests and reflected much discredit upon it. Appellant was paid to the time of the discharge. The trial

resulted in a judgment for appellee, which was affirmed by the Appellate Court for the First District.

The first alleged error presented in argument is the admission in evidence of the following letter written by the plaintiff to the defendant in connection with the execution of the contract:

"NEW YORK, Dec. 2, 1899.

"*Mr. E. C. Miller, Vice-Pres't Magnolia Metal Co., New York:*

"MY DEAR SIR—Inasmuch as certain matters of a private nature to me have been brought to your attention, and knowing that you consider same to be, if continued, detrimental, not only to myself but to the company, I wish to say that upon conditions of our renewing contract for my services I reiterate in full my conversation to you of yesterday. That as far as concerns me you will not in future have any occasion to refer to the matter again.

"Yours very truly,      F. E. GOULD."

Plaintiff had previously been in the employ of defendant. He had a wife and child, and had publicly and intimately associated in Pittsburg, during such employment, with a woman named Bessie VanHansen. There was evidence tending to prove that defendant refused to renew the contract of employment unless he agreed specifically to cut his acquaintance with that woman and have nothing more to do with her; that Mr. Miller, the vice-president and general manager of defendant, told plaintiff that defendant regarded the association as bad for its business; that such association had been the cause of his removal from Pittsburg at the request of defendant's agents, and that defendant proposed to have this agreement incorporated in the contract, but that plaintiff said it was of such an offensive nature he would not do it that way but would write a letter to that effect. Plaintiff testified that the conversation with Miller and the condition of renewal related to his marital relations, but it was not denied that he wrote the letter and delivered it. It was a part of the same transaction with the execution of the contract, and was understood by both

parties to be a part of the agreement or in explanation of its meaning.

The first objection to the letter is, that it was not admissible, under the pleadings, because the contract was set out *in hæc verba* in the declaration and its execution was not denied under oath, as provided by section 34 of the Practice act. It is argued that by failing to deny the execution of the contract as set out, defendant admitted that it constituted the whole contract and agreement between the parties, and that if defendant claimed it was not the whole contract it should deny its execution. That section of the Practice act establishes a rule of evidence, and dispenses with proof of the execution of a written instrument declared upon unless the execution is denied by a verified plea. The execution of the contract as set out in the declaration was not, and could not truthfully be, denied by the defendant, and the letter did not tend to make a new or different contract or substitute another one. The only effect of failing to deny the execution of the contract was to make it admissible in evidence without proof of its execution. A verified plea was not necessary to permit the introduction of evidence explanatory of its meaning.

A second ground of objection is, that the letter tended to vary a contract which was complete in itself. It is the rule that testimony is inadmissible to contradict or vary the terms of a contract which purports to contain the whole agreement of the parties and shows no uncertainty as to the object or extent of such agreement. In such a case it is conclusively presumed that all previous and contemporaneous engagements by which the parties intend to be bound are contained in the writing. On the other hand, it is equally well established that where the agreement is evidenced by more than one writing, all of them are to be read together and construed as one contract, and all the writings executed at the same time and relating to the same subject matter are admissible in

evidence. (*Stacey v. Randall*, 17 Ill. 467; *Gardt v. Brown*, 113 id. 475; *Crandall v. Sorg*, 198 id. 48; 1 Greenleaf on Evidence, sec. 283.) In this case the writings were executed as different parts of the same agreement and related to the same subject matter. Together they were understood and intended by the parties to constitute the agreement. If, as the evidence tended to prove, the language employed in the seventh paragraph was not made more explicit on account of the offensive nature of the matter referred to and plaintiff preferred to write the letter, it did not involve any variance from the contract, but only enabled the court to definitely ascertain and carry out the meaning and intention of the parties. The letter did not vary, contradict or add to the contract set out in the declaration in any material respect. It is clear from the evidence that the seventh paragraph related either to the marital relations of the plaintiff, as claimed by him, or to his association with the other person, as claimed by the defendant, and the letter operated both as a part of the contract and as an explanation of the meaning of its terms.

The court admitted, over the objection of the plaintiff, evidence of the conversation between plaintiff and Miller which the letter stated was reiterated in full upon condition of renewing the contract. The substance of this conversation is given above. It is manifest the letter was incomplete and meaningless without the conversation which was thereby reiterated. The conversation was not copied into the letter, but, in effect, was incorporated by reference to it, and proof of the conversation was admissible. Counsel say that in detailing the conversation referred to in the letter the witness Miller was allowed to state a previous conversation. The court did not admit evidence of a prior conversation, but refused to strike out an answer in which the witness said that the conversation detailed was the same as plaintiff had previously said to him at Pittsburg in relation to his

wife and the VanHansen woman. It was merely a statement that what was said had been said before, and was not harmful to the plaintiff.

It is next insisted that the court erred in admitting evidence "(1) concerning the marital relations of appellant; (2) concerning the relation between plaintiff and Bessie VanHansen; (3) concerning the general reputation for chastity of Bessie VanHansen; (4) concerning the disease for which Dr. Pudor treated Bessie VanHansen; (5) concerning the relations of Bessie VanHansen's sister and a man named Whitelsey; (6) concerning the general reputation for chastity of Bessie VanHansen's sister; (7) concerning a letter signed 'Emma,' received by appellant." The evidence so admitted related to the conduct and habits of plaintiff and the reputation and character of his associates. It showed that after the making of the contract, plaintiff, when located in Boston in the service of defendant, renewed his relations with Bessie VanHansen; that she came to Boston and he took her to Portland, Maine, to a hotel, where she remained for some time; that he took her at that place to a blood-disorder specialist and placed her under treatment for a disease of a private nature; that he paid the doctor's bills, running at least a year; that he paid her hotel bills while there, and associated with her, leaving Boston weekly to go and visit her at Portland; that her general reputation was bad; that the reputation of her sister, whom he had met in Pittsburg, was bad, and he understood her relations with the man Whitelsey to be improper; that plaintiff received the letter signed "Emma," from Boston, and that he knew a woman of that name at a house which he had visited and the persons named in the letter were his acquaintances. The letter was full of vile language and filthy statements concerning plaintiff's acquaintances named in it and could not have emanated from any but the lowest possible source. We think it was entirely competent to make this proof, under the contract set out

in the declaration, regardless of the letter, and for still stronger reasons in view of the letter.

Counsel, in commenting on instructions given to the jury, insist that the question what would constitute an adequate cause or legal ground for the discharge of the plaintiff under the contract was a question of law for the court. That is undoubtedly true, although the plaintiff could not complain of that question being submitted to the jury, for the reason that by his own instructions he caused the same question to be submitted for decision. What facts would constitute a legal ground for discharge is not to be determined by the judgment of the jury, but is a question for the court, and there is no controversy as to the existence of the facts relied upon as a ground for discharge. We have no hesitancy in saying that such facts constituted ample legal ground for plaintiff's discharge, and that the disgraceful conduct of plaintiff would naturally reflect discredit on his employer and be injurious to its business interests. For a business concern to select, as a matter of choice, a person of such habits and associates would tend to discredit the employer in the estimation of decent people with whom it was doing business, and to say that such people would be as willing to do business through such a representative as with a reputable person would be equally an affront to decency and common sense.

A further ground of objection to some of this evidence is, that the defendant was permitted to cross-examine the plaintiff upon matters which had not been inquired into on his direct examination. Plaintiff, when testifying, identified the letter discharging him, which stated at length the reasons for his discharge, and the letter was offered in evidence. He then identified a letter written by him to the defendant denying the right to discharge him, in which he said that the statements of the letter to him that his conduct had been injurious to defendant's business interests or reflected discredit upon it, or that any act of his had been a sufficient excuse for dispensing

with his services, were false. He was then cross-examined as to such facts, and while considerable latitude was allowed, we think the court did not abuse its discretion.

There are some objections to instructions, one of which has already been noticed, and some others relating to the question of damages have become immaterial in view of the verdict and judgment. It is objected to the third instruction given at the request of defendant, that it did not limit the jury to the contract signed by the parties and introduced in evidence. The instruction stated that if the jury believed that at the time of entering into the contract plaintiff promised, as a condition thereof, he would refrain, during such employment, from publicly associating with Bessie VanHansen, but during the employment did openly and publicly associate with her, the verdict should be for the defendant. It will be seen that we do not regard this instruction as erroneous from what we have said as to the admissibility of the letter and conversation. But it is further urged that the agreement to not publicly associate with Bessie VanHansen was an independent contract, not constituting a breach of the contract of employment but for which defendant might sue plaintiff for damages, if it sustained any. The parties had a right to make it a condition of the employment, or a continuance of it, that plaintiff should refrain from publicly associating with Bessie VanHansen, and the evidence showed that it was a condition of the employment and not an independent covenant.

An objection is made to the fifth instruction on practically the same ground as to the third. It was a repetition of the third, and the practice of emphasizing instructions by repetition is not proper, but there was no error in the statement of the law and the giving of it is not ground for reversal.

The sixth instruction stated that it was proper for a party employing a married man as a salesman to make it a condition of employment that he should not asso-

ciate with a certain woman to whom he owed no legal duty, and application of that rule was made to the facts of the case. It is objected to, as suggesting a distinction between the rights and liabilities of a married and a single man employed to sell babbitt metal, and it is said that any tendency to make such a distinction should be frowned upon as against public policy. We do not know of any rule of public policy that would prevent the parties making such a contract.

We find no error in the record. The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS

v.

ESTATE OF ROBERT MOIR, deceased.

*Opinion filed February 17, 1904.*

1. DOMICILE—"residence," as intended by *Inheritance Tax act*, means "domicile." The "residence" in Illinois contemplated by the *Inheritance Tax act* is synonymous with "domicile" or "abode."

2. SAME—*residence presumed to continue until contrary is proven.* A residence once established is presumed to continue, and one alleging that a change has taken place has the burden of proof.

3. SAME—*inconsistent declarations as to change of residence have little weight.* Declarations, while admissible on the question of a change of residence, are entitled to but little weight where they are inconsistent with the acts of the party making the same.

4. SAME—*an intention to change residence is not sufficient.* To bring about a change of residence there must not only be an intention to make the change, but the same must be actually effected by abandoning the old residence and permanently locating in new one.

5. INHERITANCE TAX—*when party is a resident of Illinois within the meaning of Inheritance act.* One who has decided to move from Illinois to the home of his daughter in another State as soon as his business is settled, but in the meantime is taken ill and is taken by his daughter to her home for medical treatment and care, where he dies within a short time, will be deemed a resident of Illinois at the time of his death, within the meaning of the *Inheritance Tax act*, where it appears such change was not expected to be permanent, everything being left undisturbed at the old home.

6. SAME—*intention to postpone enjoyment in lands conveyed need not be evidenced in writing.* If the actual intention of the parties to a deed is that the possession and enjoyment of the lands are postponed until the grantor's death, the Inheritance Tax act is applicable, notwithstanding such intention is not evidenced in writing.

7. SAME—*when lands are subject to inheritance tax.* Where deeds to lands are executed simultaneously with a partnership agreement between the grantor and the grantees, his sons, and the income from the land is thereafter carried into the partnership account, one-half going to the grantor and the remainder to the grantees, the one-half of the land as to which possession is thereby postponed is subject to the Inheritance Tax act.

APPEAL from the County Court of Henderson county;  
the Hon. W. T. CHURCH, Judge, presiding.

This is an appeal from a judgment of the county court of Henderson county adjudging that the estate of Robert Moir, deceased, was not subject to an inheritance tax.

The deceased had resided in Oquawka, in Henderson county, for many years, where he owned his residence and was engaged in the business of banking, merchandising, loaning money and farming, and where he had accumulated a large fortune. His wife died in September, 1901. For some time prior to her death he had contemplated leaving Oquawka. He talked of going to California, and finally determined to go to Burlington, Iowa, where a married daughter, the wife of George Tracy, an attorney of that city, resided, and with whom he expected to make his home. On Saturday, December 7, 1901, said daughter was at her father's home in Oquawka. That afternoon Mr. Tracy came to Oquawka with the intention of remaining over Sunday. In the afternoon of that day Dr. Fleming, of Burlington, was called by telephone to Oquawka to see Mr. Moir, who was somewhat indisposed. On his arrival he held a consultation at the residence of Mr. Moir with Dr. Hanson, Mr. Moir's family physician, who resided at Oquawka. It was found that the deceased was suffering from an ulcerated tooth, and it was suggested that he go to Bur-

lington, where the same could be satisfactorily treated. That evening Mr. and Mrs. Tracy and Dr. Fleming returned to Burlington, accompanied by Mr. Moir. On their arrival at the Tracy home a dentist, Dr. Cochran, was called. Dr. Fleming, in company with Dr. J. W. Holiday, treated Mr. Moir until December 19, 1901, when he died at the home of Mr. Tracy. The remains were taken to Oquawka for interment. The funeral was held at and the burial took place from the Moir residence, in which no change had been made during the twelve days intervening between the time Mr. Moir went to Burlington and his death.

On June 1, 1898, Robert Moir executed a deed, for the consideration of \$100 and other good and valuable considerations, to his three sons, Alexander, James and Robert, purporting to convey to them all his real estate situated in Warren and Henderson counties, Illinois, except his homestead in Oquawka, which deed was acknowledged February 26, 1899, and recorded in Henderson county March 25 and in Warren county March 27, 1902. On the same day that the deed bears date Mr. Moir gave to each of his three sons \$200,000 in personal property, and articles of co-partnership were executed between said Robert Moir and his said sons whereby the members of the firm were each to put into the business \$200,000 and were to succeed to the banking business carried on before that time by Robert Moir. Robert Moir was to receive one-half of the profits of the business, and the other half was to be divided equally among the three sons. The farms owned in Warren and Henderson counties, purporting to be conveyed by said deed, had been rented by Robert Moir prior to the execution of said deed and were occupied by tenants, a number of whom testified they knew of no change in the ownership of the farms occupied by them, respectively, prior to the date of the death of Robert Moir, and that they transacted the business connected with the renting of said farms

and in payment of rent with Robert Moir after the date of the deed the same as they had done before that date. The sons testified the land was not a partnership estate, but that the income thereof, as it accrued, was carried into the partnership account, and that Robert Moir received one-half thereof, as a member of said firm, up to the time of his death.

It was stipulated on the trial that Robert Moir died possessed of personal property of the value of \$826,107.22, and that the real estate conveyed on June 1, 1898, to the three sons, was of the value of \$105,200.

Propositions of law were submitted to the court wherein the court was asked to hold, as a matter of law, upon the facts disclosed by the evidence, that Robert Moir, at the time of his death, was a resident of Henderson county, and that the personal property of which he died possessed was subject to the payment of an inheritance tax; also, that said real estate was conveyed to said grantees with the intention that said conveyance should not take effect in possession or enjoyment until after the death of the grantor, and that said real estate was subject to the payment of an inheritance tax. The court refused to hold said propositions of law, and the action of the court in holding that the estate of Robert Moir, deceased, was not subject to an inheritance tax under the statute of this State is assigned as error in the manner following, that is to say:

*First*—The court erred in holding that Robert Moir was not a resident of Illinois at the time of his death and that his personal estate was not subject to an inheritance tax.

*Second*—That the court erred in holding that the real estate in Warren and Henderson counties conveyed by the deed of June 1, 1898, was not subject to an inheritance tax.

*Third*—The court erred in refusing to mark "held" and to hold as the law the seven propositions of law, and each of them, submitted for the People.

H. J. HAMLIN, Attorney General, and J. W. GORDON, State's Attorney, for appellant:

A domicile or residence once established continues until abandoned and another of like character acquired in its stead. *Hayes v. Hayes*, 74 Ill. 314; *Glover v. Glover*, 13 Ala. 365.

The burden of proof lies on the party who asserts the change. 5 Am. & Eng. Ency. of Law, 865, note 2.

To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last residence a permanent home. *Hayes v. Hayes*, 74 Ill. 312.

While conversations and declarations in regard to present or future domicile are admissible in evidence, they are the lowest species of evidence. *Kreitz v. Behrensmeyer*, 125 Ill. 197.

Declarations of a party may be disputed by his acts. *Kreitz v. Behrensmeyer*, 125 Ill. 197.

Under the Inheritance Tax act, where a deed in fee simple is executed and a bond taken for the payment to the grantor, during his lifetime, of one-half the net income, the deed is regarded as being intended to take effect in possession or enjoyment after the death of the grantor. *Reish v. Commonwealth*, 106 Pa. St. 521.

Where a will is made devising real estate, and the testator then makes a deed conveying his lands to persons named, to be disposed of as directed in his will, the land is subject to an inheritance tax. (*Appeal of Seibert*, 110 Pa. St. 329.) So, also, where the net income of the land is directed to be used for a certain purpose during life. *Crocker v. Shaw*, 54 N. E. Rep. 549.

H. B. SAFFORD, and R. J. GRIER, for appellee:

A citizen cannot be subjected to special burdens of taxation without a clear warrant of law. Either he or

his property must be brought clearly within the terms of the act. *People v. Sherwood*, 113 N. Y. 174.

Where a tax is special the tax-payer cannot be subjected to it without a clear warrant of law. *In re Enston's Will*, 113 N. Y. 174; *In re McPherson*, 104 id. 306.

The question of "domicile," in its legal signification, is immaterial in this case. The material thing is the question of "residence" at the time of the death of Robert Moir, as that is the term used in the Inheritance Tax act. *Supervisors v. Davenport*, 40 Ill. 197.

"Residence" and "domicile" are different things. They are not convertible terms or synonyms. 21 Am. & Eng. Ency. of Law, 124.

There is a broad distinction between a resident and a citizen. A man may be a resident of one State and a citizen of another State. *Darst v. Bates*, 51 Ill. 349.

A residence is a fixed and permanent abode or dwelling place for the time being, as contra-distinguished from the mere temporary locality of existence. *Anderson's Law Dic.*

To reside is to dwell permanently or for a length of time; to have one's home or settled abode; to abide continuously or for a lengthened period. *Encyclopedic Dic.*

A resident of a place is one whose place of abode is there and who has no present intention of removing therefrom. 21 Am. & Eng. Ency. of Law, 122.

Residence is a question of fact. *Witbeck v. Hardware Co.* 188 Ill. 154.

In order to acquire a residence there must be a settled fixed abode, and an intention to remain permanently, at least for a time, for business or other purposes. *Supervisors v. Davenport*, 40 Ill. 197.

Where a man acquires a permanent abode or dwelling place out of this State, at least for the time being, he becomes a non-resident. *Pells v. Snell*, 130 Ill. 379.

The place of one's legal residence is very largely a matter of intention. *Albee v. Albee*, 141 Ill. 550.

Intention enters into and forms a large element in fixing a person's residence. *Cobb v. Smith*, 88 Ill. 199.

Where there is a fixed determination to remain at a place for the time being, the party becomes a resident. *Way v. Way*, 64 Ill. 408.

MR. CHIEF JUSTICE HAND delivered the opinion of the court:

The controlling questions of law and fact arising on this record lie within a very narrow compass.

*First*—Was Robert Moir a resident of Henderson county at the time of his death? Mr. Moir had lived in that county for many years, and when a residence is once established the presumption is that it continues, and the burden of proof is upon the party to show a change who claims a residence once established has been changed. (10 Am. & Eng. Ency. of Law,—2d ed.—p. 6.) In this case the evidence relied upon to show a change of residence of Mr. Moir from Oquawka to Burlington consisted wholly of the proven declarations of the deceased. While such declarations are admissible in evidence they are not considered a high class of evidence, and when the acts of the party are inconsistent with his declarations the declarations are entitled to but little weight. (*Kreitz v. Behrensmeyer*, 125 Ill. 141.) The record is voluminous, and to set out in this opinion the declarations of Mr. Moir testified to by the numerous witnesses who testified upon that subject would serve no useful purpose. Suffice it to say, it is clear therefrom that the deceased had made up his mind to go to Burlington and make his home with his daughter at that place at some time in the future not far remote from the time when he actually went to Burlington. The evidence of all the witnesses on that point, with one or two exceptions, agrees, however, that at the several times upon which he spoke upon the subject he said he would go to Burlington when the business with which he was then connected was closed up. The busi-

ness of himself and sons at Oquawka, during the fall of 1901, was in process of settlement preparatory to the contemplated change. No new goods were being bought for the store which they were carrying on at that place, and the depositors in the bank were being paid off preparatory to transferring the assets of the bank to a national bank which was being organized at Oquawka to take on its business. The business was not, however, closed up at the time the deceased went to Burlington, and it is admitted that the various enterprises in which Mr. Moir was engaged continued to be carried on by his sons until some weeks after the death of Mr. Moir. The time, therefore, when the deceased had determined to change his residence had not arrived at the time he went to Burlington. To bring about a change of residence it is necessary that there be not only an intention to change the residence, but the change must actually be made, which can only be effected by abandoning the old and permanently locating in the new place of residence. We are strongly impressed that the deceased intended to make the change so soon as his business was closed up, but are equally clear that such intention was never executed by a permanent abandonment of the old and the selection of a new place of residence by Mr. Moir. It appears that he was at his home in Oquawka on the 7th of December, 1901; that he was indisposed; that his daughter was with him; that Mr. Tracy came from Burlington on the afternoon of that day to Oquawka, expecting to spend the following day, Sunday, at the home of the deceased; that during the afternoon Dr. Fleming was telephoned to come to Oquawka; that he did so and met Dr. Hanson at the residence of the deceased; that after consultation they determined that Mr. Moir was mainly suffering from an ulcerated tooth, and that it was desirable he should see his dentist at once, who resided in Burlington; that thereupon Mr. and Mrs. Tracy returned home, the deceased going with them; that the

dentist was sent for and met him at the house of his daughter, and that other complications arising and Mr. Moir growing worse, he remained at the Tracy home until his death, which occurred December 19, 1901. It is plain that Mr. Tracy and wife did not return to Burlington in company with Mr. Moir by reason of the fact that after Dr. Fleming and Dr. Hanson arrived at the home of the deceased it was then agreed the time had come when the contemplated change of residence should be made, but that they returned to their home and took the deceased with them in order that the deceased might readily receive the medical attention which it was thought he needed. To have effected a change of residence at that time it was necessary that Mr. Moir should have gone to Burlington with the fixed intention of changing his residence,—that is, with the intention of abandoning his old residence and taking up a new residence in Burlington. The clear inference to be drawn from the evidence is, that the deceased went to Burlington for the purpose of receiving medical treatment, and not with the intention of effecting a change of residence. His business not having been closed up, he left his home, and all that was in it, as it had existed for years, his unmarried daughter, who was his house-keeper, and his servants, remaining. After his death his remains were taken back to the old home and a funeral was there held. All the facts show that he went to Burlington for a temporary purpose, and not with the intention of making said city his permanent future residence.

The terms "residence," "abode," "domicile," and kindred terms, differ somewhat in meaning, but when used in statutes similar to the one in force in this State providing for an inheritance tax, have frequently been held to be synonymous. (10 Am. & Eng. Ency. of Law,—2d ed.—p. 9; Cooley on Taxation,—2d ed.—p. 369; *Thorn-dike v. City of Boston*, 1 Metc. 242.) In *Hayes v. Hayes*, 74 Ill. 312, on page 316 it is said: "To effect a change of

domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home."

In *DuPuy v. Wurtz*, 53 N. Y. 556, on page 561 the court say: "To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicile and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Length of residence will not alone effect the change; intention alone will not do it, but the two taken together do constitute a change of domicile."

In *Thorndike v. City of Boston*, *supra*, which was an action to try the question whether the plaintiff, who had left the country with his family, was liable afterwards to be taxed as an inhabitant of the place of his former residence, the court, speaking through Chief Justice Shaw, said (p. 245): "The questions of residence, inhabitancy or domicile,—for although not in all respects precisely the same they are nearly so and depend upon much the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues until he acquires another; and *vice versa*, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circum-

stances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fix it, beyond question, in another. So, on the contrary, very slight circumstances may fix one's domicile if not controlled by more conclusive facts fixing it in another place."

We are of the opinion the county court erred in holding that Robert Moir was a resident of the State of Iowa at the time of his death.

*Second*—Was the real estate conveyed by the deed on June 1, 1898, subject to an inheritance tax? The solution of that question depends upon whether said conveyance was intended to take effect in possession or enjoyment after the death of Robert Moir. If it was, the lands transferred by said deed are subject to an inheritance tax, otherwise not. The evidence shows that the deed and the co-partnership agreement were executed simultaneously; that the real estate was not a partnership asset, but that the profits from the real estate were carried into the co-partnership account, and that Robert Moir, as a member of said firm, received, from the time of the execution of the deed to the time of his death, one-half of the rents of said lands. If the rents from the lands had been reserved by Robert Moir, during his life, in the deed or by other writing, it would be plain that the deed was not intended to take effect in possession or enjoyment during the life of the grantor. If that was the intention of the parties to the deed, can an inheritance tax on said lands be defeated by reason of the fact that the intention to postpone the possession or enjoyment of the lands until after the death of the grantor is not evidenced in writing? We think not. If the failure to evidence such intention in writing would defeat the

inheritance tax, such tax could be defeated in every case by the parent executing a deed to his children and prospective heirs, relying upon their parol promises to account to him for the rents of the lands conveyed during the life of the grantor. In this case the grantor, by virtue of the partnership with his sons, who were the grantees in the deed, did not postpone the possession or enjoyment of all the lands until after the death of the grantor, but only the one-half part thereof. As to one-half of said lands the possession and enjoyment thereof were postponed during the life of Robert Moir, and we think, by reason of that fact, said one-half was subject to the payment of an inheritance tax. In *Reish v. Commonwealth*, 106 Pa. St. 521, a deed in fee simple was executed and a bond taken for the payment to the grantor, during his life, of one-half of the net income, and it was held the deed was intended to take effect in possession or enjoyment after the death of the grantor, and the estate was subject to an inheritance tax. In *Appeal of Seibert*, 110 Pa. St. 329, a will was made devising real estate, and the testator then made a deed conveying his lands to persons named, to be disposed of as directed in his will. The land was held subject to an inheritance tax. In volume 24 of the first edition of the American and English Encyclopædia of Law (page 464) it is announced that the policy of the law will not permit the owner of an estate to defeat the plain provisions of an inheritance law by any device which secures to him, for life, the income, profits and enjoyment of the estate. It must be by such a conveyance as parts with the possession, the title and the enjoyment in the grantor's lifetime.

The judgment of the county court is reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

JACOB GLOS

v.

NELLIE CARLIN *et al.**Opinion filed February 17, 1904.*

1. PARTITION—*rule as to burden of proving invalidity of tax deed in partition proceeding.* On a bill for partition and to cancel a tax deed as a cloud on title the complainant has the burden of establishing the invalidity of the tax deed, the same as though the proceeding were solely to remove a cloud on title.

2. SAME—*allegations with respect to invalidity of tax deed must be supported by proof.* Where a bill for partition and to remove a tax deed as a cloud on title alleges that the tax deed is invalid for certain specific reasons, complainant must prove that the tax deed was invalid for some one or more of the reasons alleged, in order to warrant a decree canceling such deed.

3. CLOUD ON TITLE—*what equivalent to cancellation of tax deed.* A decree in a proceeding to partition land and cancel a tax deed, which finds that the defendant owner of the tax deed "has no right, title or interest in or to said lots under the tax deed issued to him, or in any manner whatsoever," is equivalent to a finding that the tax deed is a cloud on title and should be removed.

4. SAME—*when recital as to proof is not conclusive.* A recital in a decree granting the relief prayed on a bill for partition and to remove a tax deed as a cloud on title, that the owner of the tax deed "has failed to show or establish any title," does not aid in sustaining the decree, where no proof of the invalidity of the tax deed was introduced.

APPEAL from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This is a bill, filed on December 13, 1901, in the Superior Court of Cook county by the appellee, Nellie Carlin, against Jessie O. Darrow, Catherine Schilling, Jacob Glos and Henry L. Glos for the partition of two lots, known as lots 22 and 24 in block 2 of Douglas Park addition to Chicago, and also for the removal of two tax deeds as clouds upon the title to the lots, sought to be partitioned. A decree, such as is hereinafter set forth, was entered in favor of the present appellees and against

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213	1 84

the appellant, Jacob Glos. The present appeal is prosecuted from such decree.

The bill alleges that the complainant below, Nellie Carlin, and two of the defendants, Jessie O. Darrow and Catherine Schilling, are the owners in fee simple, as tenants in common, of said lots 22 and 24; that the appellee, Nellie Carlin, is the owner in fee of an undivided one-half of said lots; that Jessie O. Darrow owns an undivided one-half of lot 22, and Catherine Schilling an undivided one-half of lot 24. The bill also alleges that the appellant, Jacob Glos, claims an interest in lot 24 by virtue of a tax deed, dated June 21, 1901, and recorded July 19, 1901; that said tax deed was issued to Jacob Glos upon application No. 6209K upon a tax sale of lot 24 to Jacob Glos on October 5, 1898, for the 1897 general taxes thereon for \$11.88. The bill also makes allegations as to two certain tax deeds, issued to Henry L. Glos conveying to him said lot 22; but the controversy with Henry L. Glos was settled after the beginning of this suit, and, by the final decree entered, the cause was dismissed without costs as to Henry L. Glos and as to the tax deed described in the bill as having been issued to him, so that there is here now no controversy as to Henry L. Glos.

The bill sets up that the tax deeds described therein, including the tax deed of lot 24 to Jacob Glos, are void for certain reasons appearing in the proceedings for said tax sales, and in the applications filed for the issuance of said deeds; and the bill sets forth some ten or eleven specific reasons why said tax deeds are void. Among the reasons alleged are, that the precept and judgment for each of said tax sales were void, because the court had no jurisdiction, and because the judgment recites that it is for both taxes and assessments. The bill also alleges "that said tax deeds exist of record uncanceled, are clouds upon the title to said real estate, and tend to depreciate its value and prevent a sale thereof."

The bill avers that complainant is ready and willing, and offers to re-pay to the holders of the tax deeds the several amounts paid by them at the tax sales, with lawful interest thereon, and all subsequent taxes, with interest, and such further sums, as equity may require, as conditions precedent to the setting aside of said deeds.

The bill prays for partition, and that, in case it can not be made, the real estate be sold and the proceeds be divided. It also prays "that said tax deeds be removed as clouds upon the title to said real estate; that defendants Jacob Glos, Henry L. Glos and those claiming under them, be restrained from asserting any right, title or interest in said real estate."

Jacob Glos filed an answer, denying that Nellie Carlin, Jessie O. Darrow and Catherine Schilling were the owners in fee simple, as tenants in common of the premises in question, and claiming that he and Emma J. Glos and D. Arnold are the owners of said premises; that, at the time of the filing of the bill, all interest, if any, which the complainant and Jessie O. Darrow and Catherine Schilling had, had been lost through the tax deeds. Defendant, Jacob Glos, denies that the tax deeds mentioned in the bill or either of them are illegal for any of the reasons stated in the bill, and denies that the reasons stated are sufficient to render said tax deeds, or any of them, invalid, but avers that each one of said tax deeds is a valid and legal conveyance, etc.

The answers of Jessie O. Darrow and Catherine Schilling admit the ownership of the property, as alleged in the bill, and join with complainant in alleging the invalidity of the tax deeds therein described for the reasons therein set forth, and ask that the same may be removed.

In its final decree, rendered on September 21, 1903, the court below found that it had jurisdiction of the subject matter and of the parties; "that equities are with the complainant; that the material allegations of the bill are true;" that the parties own undivided interests,

as alleged in the bill; that Jacob Glos claims some title or interest in lot 24 by virtue of the tax deed, dated June 21, 1901, "but the court finds that said Jacob Glos has failed to show or establish and has no right, title or interest whatever in or to said lot 24, under or by virtue of said tax deeds, or in any manner whatsoever;" that "Jacob Glos has no right, title or interest in or to said lots, under the said tax deed issued to him, or in any manner whatsoever." The decree then orders that partition be made, and appoints commissioners, etc.

JACOB GLOS, *pro se*, (JOHN R. O'CONNOR, of counsel.)

OLIVER & MECARTNEY, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill for partition, and for the removal of certain tax deeds, as clouds upon the title. The final decree found that the parties, alleged in the bill to be the owners in fee of the lots as tenants in common, did own the interests claimed by them; and, substantially, there is no controversy upon the question of such ownership and the right of the tenants in common to partition. The real controversy is between the tenants in common, owning undivided interests in the property, and Jacob Glos as to the tax deed of lot 24 held by him.

Section 39 of the Partition act provides that "in all suits for the partition of real estate, whether by bill in chancery or by petition, under this act, the court may investigate and determine all questions of conflicting or controverted titles, and remove clouds upon the titles to any of the premises sought to be partitioned," etc. (3 Starr & Curt. Ann. Stat.—2d ed.—p. 2925). In construing this statute, we have held that in a bill for partition, filed thereunder, the examination of title is not limited to the line of title, in which the tenants in

common claim, but that separate titles, derived from other sources and claimed in other chains of title, can be brought before the court and investigated in such a proceeding, and that clouds upon titles may be removed in the partition suit. In such cases, the court, having jurisdiction for the purpose of making partition, is authorized to proceed to settle questions of controverted titles between the parties. The Partition act thus allows two kinds of relief in relation to two different subjects to be sought in the same proceeding, to-wit, partition, and the removal of clouds upon the title sought to be partitioned. (*Gage v. Reid*, 104 Ill. 509; *Mott v. Danville Seminary*, 129 id. 403; *Hughes v. Carne*, 135 id. 519).

Where a bill is filed for the purpose of removing a tax deed as a cloud upon the title, the burden of proof is upon the complainant to show that the tax deed is invalid, and not upon the holder of the tax deed to show that his deed is valid. Such has been the holding of this court in a number of cases.

In *Hyde v. Heath*, 75 Ill. 381, it was held that, upon bill filed to impeach and set aside a tax deed as a cloud upon the complainant's title, the burden of proof is upon the complainant, and he must prove the allegations of his bill, and show the invalidity of the deed. (See also *Gage v. Reid*, *supra*; *Gage v. Bissell*, 119 Ill. 302; *Gage v. Stokes*, 125 id. 40; *Gage v. McLaughlin*, 101 id. 155).

In the case at bar, the bill alleges that the tax deed of lot 24, held by appellant, was invalid for certain specific reasons, and it was necessary for the complainant, in order to remove such deed as a cloud upon the title, to prove that the deed was invalid for some one or more of the reasons alleged. It is well settled that the proofs and allegations must agree. "It is a familiar rule in equity that a complainant is not permitted to state his case one way in his bill, and make another and a different case by the evidence. He must recover, if at all, on the grounds stated in the bill. The *allegata* and *probata*

must correspond." (*Terre Haute and Indianapolis Railroad Co. v. Peoria and Pekin Union Railway Co.* 167 Ill. 296; *Purdy v. Hall*, 134 id. 298; *Flinn v. Owen*, 58 id. 111). Here, no proof whatever was admitted, establishing the invalidity of the tax deed. The complainant below, the present appellee, Nellie Carlin, introduced in evidence the tax deed itself. The court below excluded all the evidence, offered by appellee, and admitted simply the tax deed. The decree, however, finds that all the material allegations of the bill are true; but this finding is without support in the evidence as to the most material allegation made in regard to the tax deed of lot 24. No proof whatever was admitted as to the invalidity of that deed.

The theory of the chancellor below seems to have been that, because this was a partition proceeding, all the parties were required affirmatively to establish their respective titles, and that it was incumbent upon the appellant, Jacob Glos, to prove the validity of his tax deed, and not incumbent upon the complainant below to establish its invalidity; and the final decree was rendered upon this theory.

We are not aware of any rule, which requires the proof as to the removal of a cloud upon title to be different in a partition suit from what it is in a suit, where the only relief sought is the removal of the cloud. If this were a bill merely for the removal of a tax deed as a cloud, and not for partition, it would not be contended that the burden of proof was not upon the complainant to show that the tax deed was invalid, because only in that way could he prove that the tax deed was a cloud upon his title, as alleged in the bill. Where the proceeding is for partition, and also for the removal of a tax deed, as a cloud upon the title sought to be partitioned, the same rule is applicable, that is to say, the burden of proof is upon the complainant to establish the invalidity of the tax title. There is no reason why the rule should be any different in the one case from what it is in the

other. (*Hyde v. Heath, supra; Gage v. Reid, supra; Gage v. Curtis*, 122 Ill. 520.)

It is said by counsel for appellees that there was here no finding by the court that the tax deed was a cloud, and no decree that it should be removed as a cloud. The court, however, finds in its decree that "Jacob Glos has no right, title or interest in or to said lots under the said tax deed, issued to him, or in any manner whatsoever." This finding is substantially equivalent to a finding that the tax deed was a cloud upon the title and should be removed, because the latter finding would have given no further or greater relief than the finding actually made. If Jacob Glos had no right, title or interest in lot 24 under the tax deed issued to him, and the court made a decree to that effect, then appellees obtained the relief, for which they prayed, without the admission in evidence of any proof whatever as to the invalidity of the tax deed.

The decree also finds that "Jacob Glos has failed to show or establish" any title. It made no difference whether he failed to establish or show any title or not, inasmuch as, under the allegations of the bill, and, in order to obtain the relief asked for, it was necessary for the appellees to prove that the tax deed was invalid.

We are of the opinion that the theory, upon which the trial court proceeded in holding that the appellant Glos was obliged to establish the validity of his tax title, and that the appellees were not obliged to show its invalidity, was erroneous, and opposed to the current of authority in this State.

For the error above indicated, the decree of the superior court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

BOWEN W. SCHUMACHER

v.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

207	199
f112a	886
207	199
114a	660

*Opinion filed February 17, 1904.*

1. **RAILROADS**—*railroad company entitled to car service fee.* In view of the duties required of a railroad company by law to provide prompt and proper service to shippers, a railroad company is entitled to demand a reasonable fee for car service or storage charges on car-load freight after allowing the consignee a reasonable time to unload the same, and is entitled to a lien upon the freight for such charges (*Chicago and Northwestern Railway Co. v. Jenkins*, 103 Ill. 588, distinguished.)

2. **SAME**—*lien for car service fee need not arise from specific contract.* Existence of a lien upon car-load freight for car service charges need not arise from a specific contract providing for the same, since it may arise by implication from the relation which the company sustains as warehouseman after its duty as a carrier ceases.

3. **SAME**—*the distance freight must be hauled is not an element of reasonable time.* In determining what is a reasonable time within which a consignee must unload car-load freight before he can be charged a car service fee, the distance which the freight must be hauled by the consignee is not an element for consideration.

*Schumacher v. C. & N. W. Ry. Co.* 108 Ill. App. 520, affirmed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lake county; the Hon. C. H. DONNELLY, Judge, presiding.

LOUIS ZIMMERMAN, for appellant:

A railroad company, in this State, can acquire a lien upon freight to secure the payment of car service or demurrage charges only when a provision of the statute gives it that right, or where there is an express agreement therefor between the railroad company and the one from whom it is sought to collect such charges. *Railway Co. v. Jenkins*, 103 Ill. 588; *Railway Co. v. Hunt*, 83 Tenn. 261; *Railway Co. v. Lamm*, 73 Ill. App. 592; *Railway Co. v. Holden*, id. 582; *Crommelin v. Railway Co.* 10 Bosw. 77.

PAM, CALHOUN & GLENNON, A. W. PULVER, and S. A. LYNDE, (CHARLES D. CLARK, of counsel,) for appellee:

The right of a railroad company to recover charges for the detention of cars by consignees who fail to unload within a reasonable period is thoroughly established. *Miller v. Mansfield*, 112 Mass. 260; *Barker v. Brown*, 138 id. 340; *Kentucky Wagon Co. v. Railroad Co.* 50 Am. & Eng. Ry. Cas. 90; *Miller v. Railroad Co.* 88 Ga. 563; *Railroad Co. v. Adams*, 90 Va. 393; *Kentucky Wagon Co. v. Railway Co.* 97 Ky. 32; *Pennsylvania Co. v. Steel Co.* 51 Atl. Rep. 313; 4 Elliott on Railroads, sec. 1567; *Goff v. Old Colony Railroad Co.* 22 L. R. A. 532.

A railroad company may, in its discretion, either store goods in its own warehouse or store the same in the car in which the same were transported, where such car affords the proper storage facilities. *Miller v. Mansfield*, 112 Mass. 260; *Miller v. Railway Co.* 88 Ga. 563; *Gregg v. Railroad Co.* 147 Ill. 550.

A railroad company may terminate its liability as a common carrier by unloading and storing the freight in its warehouse, thereby assuming the liability of a warehouseman only, and have a lien for all storage charges. *Railroad Co. v. Alexander*, 20 Ill. 404; *Porter v. Railroad Co.* 20 id. 407; *Transportation Co. v. Hallock*, 64 id. 284; *Railroad Co. v. Friend*, 64 id. 303; *Anchor Line v. Knowles*, 66 id. 150; *Rothschild v. Railroad Co.* 69 id. 164; *Cahn v. Railroad Co.* 71 id. 96; *Transportation Co. v. Moore*, 88 id. 136; *Scheu v. Benedict*, 116 N. Y. 510.

When the right to a lien exists, the same will not be defeated by the fact that the amount claimed may be too large, unless the owner or party desiring the possession of the goods makes a tender of the amount due. *Russell v. Koehler*, 66 Ill. 459; *Hoyt v. Sprague*, 61 Barb. 491; *Lowenberg v. Railway Co.* 19 S. W. Rep. 1051; Schouler on Bailments, sec. 125.

A lien may exist by reason of an implied contract for the same. *Miller v. Mansfield*, 112 Mass. 260; *Transporta-*

*tion Co. v. Moore*, 88 Ill. 136; *Railroad Co. v. Alexander*, 20 id. 23; *Darlington v. Railroad Co.* 72 S. W. Rep. 122; *Barker v. Brown*, 138 Mass. 340.

Public policy demands that individual convenience should be subordinate to the public good, which requires expedition, regularity, uniformity, safety and facility in moving freight. *Miller v. Railroad Co.* 88 Ga. 563; *Railroad Co. v. Adams*, 18 S. E. Rep. 763; *Kentucky Wagon Co. v. Railroad Co.* 50 Am. & Eng. Ry. Cas. 90; *Darlington v. Railroad Co.* 72 S. W. Rep. 122; 4 Elliott on Railroads, sec. 1567.

Car service or demurrage rules are recognized as being proper and lawful by the Federal courts. *Inter-State Commerce Com. v. Railway Co.* 74 Fed. Rep. 803; *Warehousemen's Ass. v. Railway Co.* 7 Inter-State Com. Rep. 556; *Millers' Ass. v. Railroad Co.* 8 id. 531.

Mr. JUSTICE RICKS delivered the opinion of the court:

Appellant brought an action of replevin in a justice's court in Lake county against appellee for three tons of coke. Judgment was for appellee in the justice court. On appeal to the circuit court of said county a trial was had before a jury, and the court directed a verdict for appellee and entered judgment thereon. Appeal was taken to the Appellate Court, where the judgment of the lower court was affirmed, and this appeal was prosecuted.

Appellant is a resident of Highland Park, and in June, 1902, purchased and caused to be shipped to himself at said place over appellee's road two cars of coke. The cars arrived in Highland Park on June 20, at seven o'clock in the morning, and at nine o'clock in the morning of the same day appellee's station agent at said point mailed appellant notice of the arrival of the cars. Appellant is a practicing lawyer residing at Highland Park and having his office in the city of Chicago, and on the same morning of the arrival of the cars, and shortly after the mailing of the first notice, appellee's agent saw appellant personally and informed him that said cars

had arrived. At that time appellee's agent did not know the freight charges, and neither by the first postal card nor by verbal statement was appellant informed on that day of the freight charges. On the morning of the 21st appellee's agent again notified appellant of the arrival of said cars, sending notice by postal card through the mail, which was received by appellant between 8:30 and 9 o'clock in the morning of that day. On the postal card so sent to appellant, after describing the freight, was the following: "Which is now at your risk; please pay charges and remove property within twenty-four hours, or same will be charged storage or delivered to warehouseman; all car-load freight shall be subject to a minimum charge for trackage and rental of one dollar per car for each twenty-four hours' detention, or fractional part thereof, after the expiration of forty-eight hours from its arrival at destination." And across the face of said postal card was stamped the following: "If this car is not unloaded within forty-eight hours from 7 A. M., June 21, 1902, a charge of one dollar per day, or fraction thereof, will be made for car service, for which this company reserves a lien upon the contents of car." Upon the 21st of June, and after the receipt of the postal card by appellant on that day, he went to appellee's station and there paid its agent the freight, taking a receipt therefor, and on each of the freight bills was stamped a notice identical with the one last above quoted. When appellant received the freight receipts he called the attention of appellee's agent to the notice with reference to the charge for car service contained thereon, and stated to him that he could not get the cars unloaded within forty-eight hours, or anywhere near that time; also recalled the fact that he had had trouble a year or so previous to this shipment with this same company at the same station, growing out of appellee's insistence upon the enforcement of the above rule. Appellant then engaged one James H. Duffy, whose business was the

hauling of coal and coke, to haul the same for him, but was informed by said Duffy that he could not begin the work until the following Monday, June 21 being on Saturday. One car was unloaded by Tuesday, June 24. On Thursday, June 26, the other car was only partially unloaded, and appellee, through its agent, notified Duffy, who was hauling the coke, that he could haul no more until the car service due from the delay in unloading had been paid. A controversy then arose between appellant and appellee, which resulted in the suing out of the writ of replevin on Monday, June 30, there remaining about three tons of coke in one car, which appellee had sealed and refused to allow to be removed until the car service was paid.

The evidence further shows that the cars, on their arrival on Friday, June 20, were placed on a stub-track, where they could be approached from one side and unloaded, and on the 21st of June were placed at the end of another stub-track, so that their removal was unnecessary until they were unloaded, and could be approached from both sides, for the purpose of unloading, without interference from switching so long as they remained at that point. The two cars in question came from and belonged to other railroad lines, one being from the Baltimore and Ohio Railroad Company and the other from the Illinois Central Railroad Company; that appellee had no warehouse for the unloading of bulk freight, such as car-loads of coal and coke, at Highland Park station, and that freight such as that in question is uniformly loaded and unloaded by the shipper and consignee.

The evidence further shows that in what was called "Chicago territory," and embracing a considerable scope of country surrounding the city of Chicago, and including Highland Park, was an association called the "Chicago Car Service Association," which was a joint association including all the railroads within that territory, all of which united in the selection of a single agent, known

as the "Car Service Association agent," the purpose and business of which association were to facilitate the loading and unloading of cars and for the securing of prompt service to shippers; that this agency or association had existed since 1888, and that appellee was a member of such association; that the United States, with reference to railroad traffic, was divided into forty-two districts, each having a similar association; that certain rules, designed to effectuate the purpose of such association, were formulated and published by it and observed by all its members and brought to the attention of shippers, as business between them arose and was conducted; that among the rules were rules 2, 4 and 5, as follows:

"2. Forty-eight hours' free time will be allowed for loading or unloading all cars, whether on public tracks or on private tracks, at the expiration of which time a charge of one dollar per car per day, or fraction thereof, shall be made and collected for the use of cars and tracks held for loading or unloading or subject to the orders of consignors or consignees or their agents.

"4. In calculating time, Sundays and the following holidays are excepted: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas.

"5. On cars arriving after 6:00 P. M. of any day, car service will be charged after the expiration of forty-eight hours from 6:00 P. M. on the day following."

The evidence showed that in the city of Chicago alone there were shipped in, approximately, 75,000 cars of coal and coke every month; that the average earning capacity of freight cars upon twenty-nine railroads in the association, for the year 1901, was \$2.42, and on appellee's road \$2.15 per day.

Under the above state of facts appellee contends that it was entitled to charge a car service or car track service of one dollar per day, after the expiration of forty-eight hours, upon these cars, and that it was entitled to a

lien upon the coke, the same being the freight contained in them, for the payment of such charges. Both of these propositions are denied by appellant, and arise upon the peremptory instruction for a verdict, given by the trial court.

Under the constitution and laws of this State railroads are public highways and railroad corporations are *quasi* public corporations. They are chartered by the State and may invoke the right of eminent domain for the acquirement of lands necessary for the conduct of their business. Regarding them as public agencies, discharging duties in which the public is interested, the State regulates and controls their rates and tolls, both for the carrying of freight and passengers, and in many other respects regulates and controls their operation. Upon the payment or tender of the legal tolls, freight or fare, such companies are required to furnish cars and transport freight and passengers within a reasonable time, and upon their failure to do so they are subject to treble damages to the party aggrieved, and in addition thereto a penalty or forfeiture to the school fund of the State. (Hurd's Stat. 1899, chap. 114, pars. 84, 85.) They must receive and transport cars loaded and unloaded over their lines, and in doing so assume the liability of a common carrier as to both such cars and freight. (*Peoria and Pekin Union Railway Co. v. Chicago, Rock Island and Pacific Railway Co.* 109 Ill. 135.) They may not discriminate against shippers in rates or facilities for shipping, and are required to make special provision for the handling and shipping of grain. All of these regulations by the State are justified and sustained upon the ground that the State is interested in the prompt and proper carriage of its products and the commerce of its people, and it would seem that reasonable rules and regulations adopted by such corporations, conducive to the proper discharge of the public duty, should, where they are not in violation of some positive law, be sustained.

Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when the car containing the freight is delivered to the consignee upon his own track or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, with reasonable and proper opportunity to the consignee to take the same, or when placed in the warehouse of such company or the warehouse of another selected by them, in any and all such cases such companies then bear to such freight the relation of warehousemen. (*Peoria and Pekin Union Railway Co. v. United States Rolling Stock Co.* 136 Ill. 643; *Gregg v. Illinois Central Railroad Co.* 147 id. 550.) If the cars in which such freight is shipped are the property of another railroad than that of the company transporting the same to the point of destination, such latter company bears the same relation to such cars as to the freight therein. (*Peoria and Pekin Union Railway Co. v. United States Rolling Stock Co. supra.*) Such are the duties of such companies appertaining to bulk freight in car-load lots, which, it may be said, by the uniform rule and custom of this country are to be loaded and unloaded by the shipper and consignee. Small or package freight, of such character and bulk that that belonging to many distinct owners may be shipped in a single car, is commonly loaded and unloaded by the transporting company or companies. When such freight reaches the point of destination and is placed in the freight depot or warehouse of such company it is held by such company as a warehouseman, and when a railroad company carries freight to its point of destination and stores the same in its warehouse, and the relation of warehouseman is established by the failure to remove the property within a rea-

sonable time, the liability of a warehouseman attaches, and not the liability of a common carrier. *Illinois Central Railroad Co. v. Alexander*, 20 Ill. 24; *Porter v. Chicago and Rock Island Railroad Co.* id. 408; *Merchants' Dispatch Transportation Co. v. Hallock*, 64 id. 284; *Illinois Central Railroad Co. v. Friend*, id. 303; *Rothschild v. Michigan Central Railroad Co.* 69 id. 164; *Merchants' Dispatch and Transportation Co. v. Moore*, 88 id. 136; *Anchor Line v. Knowles*, 66 id. 150.

It is the duty of the consignee to take notice of the time of the arrival of freight shipped to him and to be present and receive the same upon arrival, and he is not entitled to notice from the company that the same has arrived, but the company is authorized to store such freight and to be relieved of its duty as a common carrier, (*Merchants' Dispatch Transportation Co. v. Hallock*, *supra*,) and when such freight is in the warehouse the railroad company may charge storage upon the same, and it has a lien upon the freight so stored for its storage charges, and this rule obtains although the company may have given the consignee notice to remove the property within twenty-four hours. *Richards v. Michigan Southern and Northern Indiana Railroad Co.* 20 Ill. 405; *Porter v. Chicago and Rock Island Railroad Co.* *supra*; *Illinois Central Railroad Co. v. Alexander*, *supra*.

When a railroad company delivering freight at its point of destination has no warehouse at that point suitable for the storage of bulk freight in car-load lots, and the property is of such character that the cars in which it is transported furnish a proper and safe place for the same, so that it is not liable to damage or deterioration arising from heat or cold or the elements, there would seem to be no reason for requiring the transporting company to seek a warehouse of another and add the cost of removal to the cost of storage when said freight may properly be held in storage in the cars in which the same was carried; and after notice to the consignee, and a reasonable time to remove the same, reasonable storage

charges may be collected therefor and the freight held for the payment thereof. *Miller v. Mansfield*, 112 Mass. 260; *Miller v. Georgia Railroad Co.* 88 Ga. 563; *Gregg v. Illinois Central Railroad Co.* 147 Ill. 550.

In *Gregg v. Illinois Central Railroad Co.* the action was for damage to grain by water, which had been stored by the railroad company in a warehouse in Augusta, Georgia. The grain was not received promptly upon arrival at its destination and was stored, and while in storage was injured by a flood. In speaking of the duty of the company with reference to such freight, this court said (p. 560): "The railroad company was not required to keep the corn in its cars on track indefinitely, and although the consignee was in default in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation as warehouseman. In the exercise of such care it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse at the expense and risk of the owner."

In *Miller v. Georgia Railroad Co. supra*, it is said (p. 563): "It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them; and we think where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. We know of no good reason why it should

be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may, in many cases, be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier and the goods stored elsewhere at the consignee's expense. And if a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car by requesting or permitting the carrier to continue holding it unloaded in service and subject to his will and convenience as to the time of unloading, he cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service."

In *Miller v. Mansfield*, *supra*, it was said: "It is not material that the goods remained in the cars instead of being put into a store-house."

In the case at bar appellant did not discharge his duty to the appellee by being present and ready to receive his freight upon its arrival. Within two or three hours of its arrival he was notified thereof, and after it had lain there twenty-four hours and said car was placed where appellant had full and fair opportunity to remove the freight without interference in any form and to approach the car from both sides for that purpose, and when appellee's duty as a common carrier had ceased, appellant was notified that he must remove the same

within forty-eight hours, or a car service or storage charge, which, under the circumstances, must be held to be the same thing, of one dollar per car would be insisted upon. Appellant also knew, by the previous dealings between himself and appellee, that such rule obtained, and unless he could show that the limit of time was unreasonable or the charge excessive, it would seem appellee's contention to charge as for storage should be upheld.

It is also urged by appellee that the right to demand such charge and enforce the same by lien arises from the unreasonable detention of the cars in question by appellant, and that such charge is in parity with and in the nature of demurrage as it exists under the maritime law, and not based upon the theory of storage charges; that it was the duty of appellant to take notice of the arrival of his freight and to be present and ready to receive the same when it did arrive, and that having failed to do this, he, having notice of the rule of the company to charge for the detention beyond the period of forty-eight hours, a car and track service in the nature of demurrage may properly be demanded. The evidence in this case shows that by the enforcement of the rule here insisted upon, the transportation facilities in the car service territory here involved was increased practically one hundred per cent, and that only about seven per cent of the shippers or consignees, through its operation, hold their cars overtime. If such common carriers must comply with our statute and must furnish transportation for people and freight when demanded, and such companies have made proper provision in equipping their roads with an ample supply of rolling stock, and yet, because of the dilatoriness or perversity of shippers and consignees, cars may be held indefinitely at loading and discharging points, contrary to the desires and interests of such companies, then it must be plain that the statute must either fall as a dead letter or its enforcement must work great injustice to such companies.

This precise question seems not to have been before this court previous to the present case. In 1891 the Attorney General of this State, in an opinion to the Railroad and Warehouse Commissioners in complaint No. 64, *Union Brewing Co. of Peoria v. Chicago, Burlington and Quincy Railroad Co.*, and complaint No. 71, *Lyon & Scott v. Peoria and Pekin Union Railroad Co.* said: "Section 5 of the act in relation to receiving, carrying and delivering grain in this State provides that a consignee of grain transported in bulk shall have twenty-four hours, free of expense, after actual notice of arrival, in which to remove the same from the cars of such railroad corporation. There would seem to be an implied right, under the statute, to charge for a longer detention than the twenty-four hours which the statute names. Indeed, no reason is perceived, in law or justice, why an unreasonable and unnecessary detention of cars by consignees should not be paid for; and the car service association seems, from the proof before us, to be only an agency established to keep account of claims so arising and enforce them. The charges so made were thought to be reasonable, under all circumstances. \* \* \* Demurrage is an important subject, which has arisen in a practical way only within late years and long after our statute for the regulation of railroads was passed. It does not, however, follow that because there is no statutory regulation of the question there is no law."

Mr. Elliott, in his work on Railroads, (vol. 4, sec. 1567,) says: "But while it is probably true that this right is derived, by analogy, from the maritime law as administered in America, the more recent authorities have almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'we see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea.' After a carrier has

completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them, after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading, of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all. The public interests also require that cars should not be unreasonably detained in this way." And to the like effect are *Miller v. Georgia Railroad Co. supra*; *Norfolk and Western Railroad Co. v. Adams*, 90 Va. 393; 44 Am. St. Rep. 916; *Darlington v. Missouri Pacific Railroad Co.* 72 S. W. Rep. 122; *Inter-State Commerce Commission v. D., G. H. & M. Ry. Co.* 74 Fed. Rep. 803; *American Warehouse Ass. v. Illinois Central Railroad Co.* 7 Inter-State Com. Rep. 556.

Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right and contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods transported by it when not received by the consignee promptly at the place of delivery. *Miller v. Mansfield, supra*; *Merchants' Dispatch and Transportation Co. v. Moore*, 88 Ill. 136; *Illinois Central Railroad Co. v. Alexander*, 20 id. 24; *Darlington v. Missouri Pacific Railroad Co. supra*; *Barker v. Brown*, 138 Mass. 340.

It is claimed, however, by appellant that the case of *Chicago and Northwestern Railway Co. v. Jenkins*, 103 Ill. 588, lays down the rule contrary to the views we have above expressed, and that that case should be controlling in the present case. We think not. That case seems to have related to or grown out of the shipment of goods in less

quantity than a car-load lot. The character of the goods was of a perishable nature, and such, if removed from the cars, must be stored, and in distinguishing that case from cases under the maritime law, and denying that the rule applicable in contracts of shipment under the latter law applied to railroad companies, it was said (p. 600): "But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee." Thus, it will be seen that the court could not have had in mind the case of the shipment of goods of the character here involved by car-load lots, and where the undisputed evidence shows that the rule is that such freight shall be loaded by the shipper and unloaded by the consignee, and that railroads do not have warehouses in which to store that class of goods.

Appellant contends that the trial court erred in not permitting him to show, as tending to show whether the coke was unloaded within a reasonable time, the distance from his house to the station where said car was placed for unloading. In this, we think, there was no error. If such is the rule, and as there were 57,000 pounds of coke in this shipment, and it should appear by the evidence that the distance from the consignee's home to the station should be such that but one load of coke could be hauled a day, and that a ton at a load was all that could be hauled, taking the condition of the roads into consideration, then according to appellant's contention, he would be entitled to hold the cars in question at that place, without charge, for more than a month. Such a rule would practically take out of business, under the supposed case, the rolling stock of a company for one-twelfth of the year, to the prejudice of other shippers and to the detriment of the public interests. The correct rule must be that the consignee shall have a

reasonable time, after having knowledge of the arrival of his freight, to get the necessary help and means to remove the same; and it cannot be presumed that he is to do this by the employment of the fewest number of persons or teams that can be employed at such work, and at the same time have it said that any effort whatever is being made to remove the freight. No circumstance is shown here why a number of teams and abundance of help could not have been obtained, by proper effort, to have unloaded this coke within the forty-eight hours fixed by the rule, allowing for the Sunday; and if it could not, it cannot be maintained, as we think, that appellee should stand the loss of appellant's failure or inability to discharge his duty and perform his contract. Circumstances might arise, and doubtless will, in such cases, when, in determining what shall be a reasonable time, many things are necessary to be taken into consideration, but the distance that the commodity is to be hauled when removed from the company's cars, it would seem, should not be one of them.

It is urged, further, that a lien ought not to be accorded common carriers in such cases, but they should be left to their action upon the case or in assumpsit. There is no law preventing the sale, by the consignee, of the cargo, at the point of destination, to one or many persons who may be wholly irresponsible and as against whom suits would be unavailing. The object of such a rule cannot be so much for the recovery of a revenue as the enforcement of a rule that is to the benefit of all the shippers, and thereby a public benefit. The charge must be said to be little more than nominal, and yet the evidence discloses that its imposition in such cases has had a highly beneficial effect. No question is made as to the reasonableness of the charge, and if there were, it could have no effect in the case at bar, for the reason that appellant absolutely denies the right of appellee to any charge or compensation and made no tender of any por-

tion of it. *Russell v. Koehler*, 66 Ill. 459; *Hoyt v. Sprague*, 61 Barb. 491; Schouler on Bailments, sec. 125.

The views above expressed as to the rule obtaining to such charges, whether regarded as storage charges or demurrage or car service, seems to be in keeping with the weight of the modern decisions upon the question, and, we believe, will tend to the public welfare.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE FIRST NATIONAL BANK OF METROPOLIS

v.

JAMES HERBERT LEECH *et al.*

*Opinion filed February 17, 1904.*

1. GUARDIAN AND WARD—*trust arises where the guardian buys land with ward's money.* A trust, by implication, in favor of the ward arises where the guardian invests the ward's money in land and takes title in himself, and the ward may hold the land as trust estate regardless of the motives of the guardian in taking title.

2. SAME—*purchaser from guardian, with notice of trust, becomes trustee for ward.* A bank which accepts an assignment of a certificate of purchase from a guardian as security for the latter's individual account, and subsequently acquires a deed to the land, holds title as trustee for the ward, where it had notice that the certificate was acquired by the guardian with his ward's money.

3. JUDGMENTS AND DECREES—*it is sufficient if enough allegations are proved to sustain the decree.* If sufficient of the charges alleged in the bill are proved to sustain the decree it is not ground for reversal that other allegations are not proved.

4. SAME—*extent to which decree approving report of sale is res judicata.* An order confirming the master's sale of property to a guardian and the issue of a certificate of sale in his name is an adjudication that the guardian holds the legal title, but is not an adjudication as to whether he holds it for himself or in trust.

APPEAL from the Circuit Court of Massac county; the Hon. O. H. HARKER, Judge, presiding.

Appellees, on June 12, 1902, filed their bill of complaint in the circuit court of Massac county against appellant. The bill alleges that on January 10, 1896, one Frank Adams was appointed guardian of complainants, who were then minors, and as such guardian received from his predecessor \$7037.12; that on January 20, 1896, Adams purchased a note for \$4000, secured by a mortgage upon certain real estate, paying for the same out of said wards' funds, and that the note and mortgage were duly assigned to him as guardian of complainants; that this mortgage was afterwards foreclosed, and on March 19, 1898, the master offered for sale the real estate therein described, under the decree of foreclosure; that the same was sold to complainant in the foreclosure suit, Adams, as their guardian, bidding the sum of \$4969.79, being the amount of the debt, interest and costs; that at the time of bidding Adams was personally insolvent; that he owed the First National Bank of Metropolis over \$1000, evidenced by over-due promissory notes, and owed other creditors in the aggregate \$1000, a large portion of which was held by said bank for collection; that the bank and its officers knew of the insolvent condition of Adams; that the master refused to issue a certificate of sale to Adams, as guardian, until the costs of the proceedings, amounting to \$162.50, were paid; that Adams did not have the money to pay these costs and applied to said bank for a loan of that amount, offering to deposit with the bank, as collateral security for this loan, the certificate of sale when issued; that the bank refused to loan the money in this way, but offered, if Adams, as such guardian, would receipt the master for the full amount due under the decree, and would have the master issue to him, individually, the certificate of sale, and would execute to the bank a new note for \$2254, and assign to the bank, as security for such new note, the certificate of sale, the bank would pay said costs, would surrender all evidences of private indebtedness due it from Adams

and would let him have sufficient money to pay his other creditors; that Adams accepted this offer, receipted the master, as guardian, without receiving any money from said master, received a certificate of sale to himself, individually, executed the note for \$2254 to said bank and assigned and turned over to the bank the certificate of sale; that the bank surrendered the private notes to Adams and placed to his credit in the bank almost \$1000 in addition, which was soon checked out and paid by the bank to other creditors of said Adams; that on November 9, 1900, the time for redemption having expired, the master executed a deed to the bank, as assignee of Adams; that Adams obtained possession of the property, but on May 20, 1902, surrendered possession to the bank, recognized it as a landlord and agreed to thenceforth pay rent to it. The bill further charges that the bank had full knowledge when said note and mortgage were purchased by Adams that they were purchased with money held by him as guardian; that it had full knowledge when he bid in the property at the sale that he bid as guardian and that he was personally insolvent; that it knew he received no money from the master, and knew that the master had received no money from him except \$162.50, which had been furnished by the bank to pay the costs; that it knew when it took the new note and the certificate that Adams was insolvent and that the note represented his private indebtedness, and that the certificate was held by him in the capacity of trustee or guardian of complainants, and that the assignment of the certificate by Adams to the bank was therefore fraudulent and void; that the bank took the title burdened with a resulting trust in favor of complainants; that at the time of the above transactions complainants were minors and knew nothing of what had been done; that Frank Adams has recently filed his report as guardian, and that therein the complainants are charged with said premises at the valuation of \$4000; alleges willingness to accept the

property at that valuation, but states that appellant now claims the absolute title to said premises. The prayer is that the assignment be declared fraudulent and void as against complainants; that the bank be decreed to hold the premises in trust for complainants and be ordered to convey the legal title to them; that an accounting for the rents and profits be had, and for general relief. The appellant and Frank Adams are made parties defendant.

A default was taken against Adams, but the bank answered, admitting the purchase of the note and mortgage by Adams and the foreclosure proceedings, but denying that Adams purchased the property as guardian, and specifically denying all other material allegations in the bill. The complainants filed a replication to this answer.

The cause was heard without other pleading. The evidence was taken in open court, and a decree rendered finding the allegations of the bill to be true, finding the equities to be with the complainants and awarding the relief sought by the bill. The bank appeals.

COURTNEY & HELM, for appellant.

C. L. V. MULKEY, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The principal insistence of appellant is that the decree is not sustained by the evidence, and that the case made by the evidence, if any, does not conform to the allegations of the bill. The finding of the decree is that the allegations of the bill are true as therein stated. The bill alleges that Adams acquired the certificate of purchase with funds belonging to his wards, the appellees, and alleges that the bank took the assignment of the certificate with knowledge of that fact. No question is made as to the first of these charges, but it is insisted

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2 Pomeroy's Eq. Jur. sec. 688; 27 Am. & Eng. Ency. of Law, pp. 251, 265; *School Trustees v. Kirwin*, 25 Ill. 73; *Fast v. McPherson*, 98 id. 496; *Cushman v. Bonfield*, 139 id. 219; *Union Mutual Life Ins. Co. v. Slee*, 123 id. 57; *Phillips v. South Park Comrs.* 119 id. 626." *Indiana, Illinois and Iowa Railroad Co. v. Swannell*, 157 Ill. 616.

The bill contains certain charges of actual fraud or fraud in fact, as distinguished from constructive fraud or fraud in law, and certain charges of conspiracy on the part of the bank and others to wrong these wards, which we do not think are sustained by the evidence; but material averments of the bill, which we have above held to have been established by the evidence, are sufficient to sustain the decree. The fact that other allegations contained in the bill are not established by the evidence does not warrant a reversal. *Booth v. Wiley*, 102 Ill. 84; *Chicago West Division Railway Co. v. Mills*, 105 id. 63.

Appellant takes the position that the decree of confirmation in the foreclosure suit is an adjudication that Adams purchased the land in his individual capacity, and that, consequently, when the certificate ripened into a deed the grantee therein would necessarily take both the legal and equitable title, and reliance is placed on the case of *Hunter v. Stoneburner*, 92 Ill. 75, which is said to be identical in principle with the case at bar. That is a case in which the complainant, Stoneburner, filed a bill to set aside a sale and conveyance in partition of property in which he had owned an interest, and also to set aside a deed conveying the same property from the purchaser at the partition sale to Hunter. In the suit to partition the land he had been made a defendant while a minor. The principal ground upon which he based his claim for relief was the charge that his co-tenant fraudulently procured the commissioners in partition to report that the land was not susceptible of division. The land was sold under a decree in partition and purchased by the co-tenant at a grossly inadequate price, and by him

conveyed to Hunter, who was the owner thereof at the time the bill to set aside the sale was filed. The court held that even if there was fraud Hunter could not be affected thereby unless he had actual or constructive notice thereof. It will be perceived at once that the notice which was proven in the case at bar was wholly lacking in the *Stoneburner case*. The court properly held in that case that in the absence of either actual or constructive notice to Hunter of the fraud, he had the right to rely upon the decree of sale and the approval by the court of the report of sale as *res judicata*. One distinction between the two cases is, that in the case before us notice to the purchaser was proved; in the *Stoneburner case* it was not. The decree of confirmation here was an adjudication, binding upon all the parties to the foreclosure suit, that Frank Adams held the legal title. On the question whether he held the legal title for another or upon a trust arising by implication in favor of another, the decree of confirmation was no evidence whatever.

Adams testified on the part of appellees. On cross-examination appellant sought to show by him that no conspiracy existed to wrong or defraud the appellees. Complaint is made of the action of the court in sustaining objections to cross-interrogatories on this subject. This was not proper cross-examination. Moreover, the witness afterwards testified, during the same cross-examination, that it was not his purpose, nor the purpose of the officers of the bank, to defraud appellees by the transaction under investigation, so that appellant had the benefit of the witness' views on that subject.

We are of opinion the decree of the circuit court does equity between the parties, and it will accordingly be affirmed.

*Decree affirmed.*

EDWARD SHEA

v.

MARGARETHA TEUFERT.

*Opinion filed February 17, 1904.*

**DEEDS**—*when a decree setting aside deed will be sustained.* A decree setting aside a deed will be sustained where the evidence shows that complainant, an aged woman, was induced to transfer property worth some \$8000 for other property represented as unencumbered but which was mortgaged for practically all its value, and that three-fourths of the cash balance she was to have was retained by one of the defendants under various pretexts.

**APPEAL** from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

ELMER H. ADAMS, for appellant.

JOHN STELK, (ALBION CATE, of counsel,) for appellee.

UTT BROS., for John C. Butts.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee filed her bill in the superior court of Cook county to set aside a deed of conveyance from her to appellant.

Appellee was the owner of a certain piece of property in Chicago known as No. 585 South Central Park avenue, consisting of a three-story brick flat-building with three apartments and of the value of about \$8000. She was seventy-three years old and in poor health, residing in one of the flats with her husband, who was sixty-nine years of age and also in poor health. They were both Germans, and claimed to be unable to speak or understand the English language. Defendant John C. Butts was a real estate agent and had the above described property in his charge for sale or trade. In September, 1902, he took the appellant, Shea, to look at the property as a prospective buyer, and as a result of that visit

a written agreement was entered into, which provided that appellee should transfer to Shea the property in question and receive in exchange therefor three other pieces of property and \$2000 in cash. The transfers were subsequently made in pursuance of such agreement, and the appellant mortgaged the property in question to one Olin, as trustee, for the sum of \$4500, out of the proceeds of which he was to pay \$2000 to appellee and \$1500 for one of the pieces of property which had been conveyed to her, and which, at the time of the transfer, belonged to a third party. Some time after the conveyances had been made appellee discovered that the property which she had received was mortgaged for about all it was worth, and she immediately filed her bill in the superior court of Cook county to set aside her deed of conveyance to appellant, on the ground that such deed and her contract of sale were obtained from her by the appellant and defendant Butts by fraud and misrepresentations. Several others were made parties defendant to the bill, but as the action was dismissed by the trial court as to them, their rights need not be considered.

Upon a hearing before the court a decree was entered, which found that the material averments of the bill had been proven and that fraud had been practiced upon the appellee in the procurement of said deed, and that both the defendant John C. Butts and Edward Shea were parties to the fraud, and that the conveyance from appellee to appellant, Shea, should be set aside and vacated. The decree further provided that the defendants should be credited with \$546.80 which they had paid to appellee on the \$2000 cash which she was to receive; that the trust deed, or mortgage, which appellant had placed on the property conveyed to him by her, amounting to \$4500, could not equitably be set aside as to the holder thereof, but that the balance of the encumbrance, amounting to \$3953.20, should be charged against the defendants Butts and Shea, and the cause was referred to the master in

chancery to ascertain the proportion of that amount which should be charged against each of them. The court also decreed that the receiver who had previously been appointed should continue in charge of several other pieces of property belonging to appellant, including those for which he had made deeds, until the rents and profits derived therefrom should be sufficient to satisfy the money decreed against the defendants. The defendant Edward Shea alone appeals. The only ground of reversal urged by him is, that the decree of the court below is not sustained by the evidence.

In support of her bill, the appellee testified, through an interpreter, that she was seventy-three years of age and in poor health; that her husband was sixty-nine years of age, and at the time the contract in question was entered into was confined in a hospital with a broken arm; that the property conveyed by her consisted of a three-story brick flat-building about six years old, modern in all respects and heated by a hot water plant; that it would reasonably rent for \$50 dollars per month; that the defendant Butts came to her and wanted to sell her house; "came in July, 1902, with another man,—I think Mr. Shea;" that at his request she permitted him (Butts) to take charge of the said property; that at the time he brought Shea to see it, he told her that the property for which she was trading was of the value of about \$8000 and would be worth \$10,000 or \$11,000 in the spring; that it was free from encumbrance, and if she would permit him to trade, he would treat her as a mother and make money for her. She further testified that she was unable to speak or understand the English language, and that at the time she signed the contract of sale its contents were not explained to her and she did not know what she was signing, and at the time the deed of conveyance was made she did not understand it was a deed and did not understand that she was conveying her property. Her husband also testified to the same statement by

the defendants as to the relative values of the property. They were both contradicted, in the main, by both of the defendants, and if the case depended altogether upon the testimony of witnesses we should hesitate to affirm the decree. Other facts and circumstances proved in the case are entitled to serious consideration and weight. At the time the trade was entered into, appellee owned property of the reasonable value of \$8000, free from encumbrance. After the trade had been entered into she received three pieces of property, all of which were much inferior in value to that which she parted with,—one encumbered by a mortgage of \$3000, worth, as testified to by defendants' own witnesses, but \$4630, the other two pieces being encumbered for about their full value. The evidence shows that appellee received practically no real estate in exchange for the property which she transferred to appellant, and that of the \$2000 which she was to receive from appellant in cash, she got but \$546, the balance being consumed in commissions charged by the defendant Butts, in the payment of judgments claimed to exist against her, and in the satisfaction of an attachment proceeding which was secured to be issued against her by the defendant Butts.

From all the evidence in the record, it would seem that the transaction as to the complainant below was most unconscionable and should not be upheld in a court of equity. It is also to be observed that in the trial of the case in the court below the testimony was taken before the chancellor in open court. He saw the witnesses and heard them testify, and as we have often held, his decree under those circumstances will only be set aside when it is clearly against the weight of the evidence. In this case we think the decree of the superior court was justified by all the facts and circumstances proved.

*Decree affirmed.*

## THE SPRING VALLEY COAL COMPANY

v.

JOSEPH ROBIZAS.

*Opinion filed February 17, 1904.*

1. FELLOW-SERVANTS—*when question whether miner and mule driver are fellow-servants is one of fact.* Whether a miner and a mule driver in the mine are fellow-servants is properly submitted to the jury, where the evidence bearing on the question is conflicting.

2. INSTRUCTIONS—*effect where instructions for both parties proceed on wrong theory.* In an action by a miner for injuries, if the defendant obtains an instruction applying certain provisions of the statute, respecting places of refuge, to the case, he cannot complain that the same provisions were applied in another instruction given for the plaintiff, even though the statute has, in fact, no application.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Bureau county; the Hon. H. M. TRIMBLE, Judge, presiding.

ALFRED R. GREENWOOD, for appellant.

O. H. PORTER, WOOD & ELMER, and DANIEL BELASCO, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

In this case appellee obtained a judgment in the circuit court of Bureau county for \$1750 on account of personal injuries sustained by him while in the employ of appellant as a miner in its coal mine No. 3, in the city of Spring Valley. Appellant appealed to the Appellate Court for the Second District, and from the judgment of that court affirming said judgment prosecuted this appeal.

The trial was by jury, and at the close of the evidence the defendant asked the court to instruct the jury to return a verdict of not guilty. The motion was denied and the instruction refused, and the ruling is assigned as error.

The declaration contained three counts. The charge against the defendant in the first count was, that it failed to provide plaintiff with a reasonably safe place to work, but permitted the same to remain in an unsafe and dangerous condition. The second count charged that the defendant delivered empty cars for the use of plaintiff in a careless, negligent manner, by leaving them in such a position that a portion of one of them protruded into the main entry near the track on which loaded cars were hauled, by reason of which such loaded cars struck the protruding car, and, hurling it against plaintiff, injured him. The third count charged negligence in the mule driver in driving the mule drawing the loaded cars so negligently and carelessly that the collision occurred.

There was no evidence tending to sustain the charge in the first count. The injury to plaintiff did not result from any failure to furnish him with a reasonably safe place to work. The accident happened in this way: Plaintiff was paid by the ton for mining coal and loading it on cars, and was assisted by his son, a boy about fourteen years old. Defendant furnished him with empty cars, which it was usual to leave for him in the entry to a room adjoining the room where he worked and about fifty feet distant. When he needed an empty car he was accustomed to go there and get one, and push it along the main entry into his room and up to the face of the coal, where it was loaded and afterward hauled out by a mule. In the main entry there was a track along which the cars were hauled, and four empty cars had been left in the entry of the adjoining room by one of the mule drivers. At the time of the accident plaintiff sent his boy to the adjoining room to get an empty car. One of these cars had some props in it, and for that or some other reason the boy was unable to move the car. The plaintiff came out of his room and went along the main entry toward the place where the empty cars were standing, and when about twenty feet distant he saw a driver

approaching along the main track with a mule and two loaded cars. He hastened to the place where the cars were and stepped into the side entry where they stood. The mule was trotting or running, and when he neared the place the driver saw that the first standing car was very close to the main track. The first loaded car struck it and the second one knocked it off the track against the plaintiff, crushing him against the side of the entry. The accident was caused by the loaded cars striking the empty car and throwing it against the plaintiff, and was not due, in any sense, to any defect or imperfection in the place where plaintiff was required to work or to any fault or negligence of defendant concerning the same. He was in a place of entire safety if the car had not been too near the main track so as to be struck by the passing loaded cars. The place was dangerous only in the sense that a negligent act causing an injury is always connected with some place. The evidence for the plaintiff tended to show that the empty cars had been negligently left in that position by the mule driver. There was a slight descent to the main track, and the driver testified that he placed the cars at a safe distance and blocked them with a stone, and that the boy and two men who were there at the time must have moved them afterwards. The evidence was conflicting and it was proper to submit that question to the jury.

It is also contended that the court ought to have directed a verdict because plaintiff and the mule driver were fellow-servants. On the other hand, it is insisted that the duty to furnish a safe place to work was one owing by the defendant to the plaintiff, and that, therefore, it would make no difference whether the mule driver was a fellow-servant of the plaintiff or not. There being no evidence tending to show that the character of the place was such as to render it dangerous, the rule invoked does not apply. The only cause of the injury was the alleged negligent act of the mule driver, and it was a

material question whether the parties were fellow-servants. The testimony was that their duties were wholly independent of each other, and under the evidence the question was one of fact.

It was not error to refuse to direct a verdict for the defendant.

An instruction was given at the request of the plaintiff requiring the jury to find the defendant guilty if the plaintiff was in the exercise of ordinary care, and was struck and injured by one of defendant's cars because of a failure on defendant's part to exercise ordinary care to supply reasonably safe places of refuge along the hauling road, not more than sixty feet apart, as required by law. There are several objections to this instruction. It was erroneous because there was no evidence whatever that the accident occurred because of the want of a place of refuge along the main track. Furthermore, the instruction was based on a statute which provides that such places shall not be required in entries from which rooms are driven at regular intervals, not exceeding twenty yards, and the undisputed evidence was that the rooms were so driven from the entry in question. It was also erroneous because the declaration was not founded upon any violation of the statute, but on negligence at common law, independently of the statute. The instruction was neither applicable to the issue nor the evidence, and it could not be cured by any other instruction because it directed a verdict upon proof of the hypothesis of fact contained in it. While that is true, the record shows that both parties tried the case upon the same theory in that respect. The defendant asked and the court gave an instruction stating the exception, that the statute did not require the defendant to have a place of refuge cut in the side wall of the hauling road where the plaintiff was injured if rooms were divided from the said roadway at regular intervals, not exceeding twenty yards apart. If the case was tried upon an incorrect theory

concerning the application of the statute to the case, both parties adopted the theory. The defendant having obtained from the court an instruction applying the statute to the case, cannot be heard to complain that it was also applied in another instruction given at the request of the plaintiff.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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JACOB GLOS  
v.  
ELLEN FLANEDY.

*Opinion filed February 17, 1904.*

1. MASTERS IN CHANCERY—*master cannot compel payment of fees as condition to hearing evidence.* The master in chancery has no power to demand payment of fees from a defendant before allowing him to give his evidence in a case referred to the master to take and report the testimony.

2. SAME—*master must take testimony offered by each party.* On reference of a chancery case it is the duty of the master to take the testimony of the witnesses produced by each party and to accord to each the right of cross-examination.

HAND, C. J., and CARTWRIGHT, J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

ENOCH J. PRICE, for appellant.

ROBERT VANSANDS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This was a petition filed by Ellen Flanedy in the circuit court of Cook county on March 28, 1902, to establish and confirm her title to certain property in the city of Chicago under the Burnt Records act. Appellant, Jacob Glos, was made a party defendant to the petition, and filed an answer denying the petitioner was the owner in

fee simple of the property described in the petition, and, on the contrary, alleged that himself and Emma J. Glos are the owners by reason of a certain tax deed, and denied that their deed was void, etc. Replication was filed and the cause referred to George Mills Rogers, master in chancery, to take proof of all the material allegations in the said bill and report the same to the court, with his opinion on the law and the evidence. The cause was heard on the report of the master, together with the evidence and exhibits, and the court found that the master had complied with all the provisions of the order of reference and that the issues are with the petitioner. Objections were filed to the master's report, and exceptions, which were practically the same as the objections, were filed in the circuit court and were overruled. A decree was entered in accordance with the facts set out in the petition and all costs were adjudged against the petitioner, Flanedy, and an appeal was prayed by Glos and allowed to the Supreme Court.

Of the numerous exceptions filed and overruled by the court none but the second was discussed by appellant, and under our view of the law the overruling of this exception is reversible error and disposes of the case, the same being as follows:

*"Second—*For that said report is not based on the evidence presented by both parties to said proceeding, as directed by the order of reference herein, but is based on the evidence offered by the petitioner, said master having refused this defendant an opportunity to present evidence in his behalf before him, excepting as to the examination in chief as to one witness."*"*

During the progress of the taking of testimony the following took place between appellant and the master:

The master: "Let's see; I want some sort of an understanding here. It just occurred to me a little while ago. I want it understood that I am not employing these stenographers; that I am here ready to take the testi-

mony myself, if anybody wants to do it that way. In other words, I am not responsible, personally, for the taking of the testimony by these stenographers, and I expect to charge for my services as master, independent of the stenographers' charges. In other words, my position is, that unless you gentlemen are willing to employ stenographers for your own convenience in the case, I am prepared to take it myself.

Mr. Glos: "I am satisfied that the master should take it in longhand. This is not my case, and I am simply here as defendant."

After taking some testimony on this day the hearing was adjourned to a subsequent day. The record shows: "Mr. Glos said he was ready to proceed with his testimony. The master told him he had sent him a bill for taking testimony on his behalf (\$2.60) and it had not been paid, and that he would not render further services to Mr. Glos until the bill was paid. Mr. Glos refused to pay the bill, and after discussion the cause was continued until the 13th of November. At that meeting the master demanded of appellant \$5 for the time consumed at the last hearing, which appellant refused to pay and offered to proceed with the evidence, and asked to cross-examine certain witnesses that had been examined for the petitioner. This the master refused, and refused to hear further evidence without the payment of fees, and continued the hearing until the 20th of November. At that meeting the master stated that he had no technical right to demand the \$5 previously demanded and would forego the payment of that amount, but would insist upon the payment of the bill that he had rendered for testimony taken, before proceeding further with the case or allowing appellant to examine or cross-examine any other witnesses. Counsel for appellant then stated that appellant would not pay the taxed costs, and tendered appellant as a witness and asked to be allowed to proceed with the testimony, which the master refused. Wit-

nesses for petitioner, in rebuttal, were then called and testified, but the master refused to permit appellant to cross-examine such witnesses, stating to appellant: 'You have the matter in your own hands. You can have your opportunity at any minute by paying for it. I guess Mr. Glos is able to pay the \$2.60, or whatever it is.'"

The master in chancery, by virtue of his office, has certain powers and duties to perform. Some of these duties are purely ministerial, for the performance of which he derives his authority from the statute, such as administering oaths, acknowledging deeds and taking depositions, in the discharge of which duties he is allowed by law to charge the fees provided by the statute and to demand the payment from those for whom, and as, the services are performed. There are other duties, judicial or semi-judicial, performed by him by virtue of the statute, such as hearing applications for writs of *ne exeat*, injunction and *habeas corpus*. In the matters of application for *ne exeat* and injunction the statute expressly provides that the fee shall be \$5, "to be advanced by the complainant and taxed with the costs." This latter is the only provision in the statute, wherein such officers are called upon to perform duties of a judicial or semi-judicial character, directly authorizing the master to demand his fees from the litigant. In all matters, when appointed by the chancellor, by virtue of his office, such as the taking and reporting of testimony, computing the amount due on which to render a decree and making report thereof, examining questions of law and fact in issue by the pleadings and reporting conclusions, and all other matters where his authority is derived from an order of the court, the master is then a part of the court and his fees and compensation are constantly subject to the supervision of the court, and we know of no authority, statutory or otherwise, which authorizes him to demand of the parties litigant, as the causes proceed before him under references from the court, the payment of

the fees or any part thereof. The law is that such fees shall be taxed as costs, (Starr & Cur. Stat. 1896, chap. 90, sec. 9,) and the courts will not suffer their proceedings to be impeded or interfered with by the quibbles of officers and litigants as to the payment or advancement of fees. It was wholly within the discretion of the master whether he would employ or use a stenographer in the taking of the testimony. It is his duty to take it, and the court is not concerned as to the manner in which he does that,—whether it be by a stenographer and the notes transcribed under the direction of the master, or whether it be in longhand, in the writing of the master or some other person under his direction. If the master deems it desirable to have the services of a stenographer he unquestionably has that right, but in such case the stenographer is in the employ and subject to the control of the master, and not of the parties or either of them, and the stenographer must look to the master for his compensation. (*Schnadt v. Davis*, 185 Ill. 476.) Under the order of reference it was the duty of the master to take the evidence of the witnesses and reduce it to writing, and it was likewise his duty to not only take the evidence of the witnesses adduced by the petitioner, but also of those adduced by the defendant, and to accord to each party the full right of cross-examination. To do less would be but to make a pretense of inquiry and bring upon a court of equity unjust and undeserved reproach; and when the evidence was taken it was the duty of the master to report it to the court with his conclusions, as such was the order of reference, with his costs noted upon his report, so that the same might be subject to the order of the chancellor and taxed to the proper parties.

The decree will be reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

*Reversed and remanded.*

HAND, C. J., and CARTWRIGHT, J., dissenting.

PETER FORTUNE

v.

JAMES H. GILBERT.

*Opinion filed February 17, 1904.*

APPEALS AND ERRORS—*an appeal must be in conformity with prayer and order of allowance.* An appeal must be dismissed which was prayed and granted to the several parties jointly but which was perfected by only one of them.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JESSE HOLDOM, Judge, presiding.

This is an action of debt, brought in the superior court of Cook county by James H. Gilbert, who sues for the use of Kate McGuire, administratrix of the estate of Robert McGuire, deceased, against Catharine McGuire, Patrick O'Toole, Cornelius Hickey and Peter Fortune, upon a *supersedeas* bond signed by the defendants below, conditioned that they would prosecute a certain writ of error with effect, and pay the plaintiff mentioned in the bond whatever judgment should be rendered against them should the cause be affirmed. Peter Fortune and Cornelius Hickey demurred to the declaration and the demurrer was overruled. On November 21, 1899, Peter Fortune and Patrick O'Toole filed their plea, and on November 22 Cornelius Hickey filed his plea, and on November 23 replication was filed to the pleas of Peter Fortune, Patrick O'Toole and Cornelius Hickey, and on the same day, upon proper affidavit, the cause was placed upon the short-cause calendar, and on January 9, 1900, Catharine McGuire was defaulted. After the cause had been placed upon the short-cause calendar, and upon the same day, plaintiff amended the declaration in the case. Rule 18 of the superior court, as shown by the bill of exceptions, provides that no cause shall be noted for trial

on the short-cause calendar until the same is at issue. The cause, however, was at issue when placed upon the short-cause calendar, except as to Catharine McGuire, who had long before that time been served with summons but had not pleaded and her default had not been entered.

On February 19, 1900, the cause was called for trial on the short-cause calendar, and the defendants Patrick O'Toole, Cornelius Hickey and Peter Fortune moved to strike the cause from the short-cause calendar, upon the ground that it had been placed there before issue joined. This motion was overruled. Trial was had before a jury, who rendered a verdict for plaintiff below for the sum of \$4100 debt and \$2256.60 damages. The cause was appealed by all the defendants below to the Appellate Court for the First District, and on the 20th day of February, 1901, the cause was taken under advisement by the Appellate Court, and on the 4th day of January, 1902, a judgment was entered affirming the judgment below, and an appeal was prayed to this court but was not perfected. On the 18th day of March the appellant moved to set aside the judgment of affirmance in the Appellate court and suggested the death of Patrick O'Toole, one of the defendants, and to continue the cause to the October term, 1902, of said Appellate Court. This motion was allowed, and on the 10th day of March, 1903, appellee moved the court to affirm the judgment of the superior court, but that motion was then denied, and afterwards, on the 28th of April, 1903, the Appellate Court further considered said cause and affirmed the judgment, from which affirmance the record shows an appeal was prayed by the defendants, the order of the court being: "This day came appellants, by their counsel, and moved the court for an appeal from the order or judgment of this court in said cause to the Supreme Court of Illinois, and the court being fully advised in the premises, doth order that an appeal be allowed herein to the said Supreme Court on condition that appellants do, within twenty

days from this date, execute and file in said cause a good and sufficient appeal bond, conditioned according to law in the penal sum of \$3000, with surety thereto to be approved by the court." An appeal bond was executed and presented to the court in the proper sum, signed by Peter Fortune alone, with Francis Salter as surety. The bond was approved and the record brought to this court, and appellee, at the October term of this court, 1903, and before said cause was taken, moved the court to dismiss said appeal upon the ground that the judgment of the Appellate Court was against the three surviving defendants, Catharine McGuire, Cornelius Hickey and Patrick Fortune, and that as the prayer of the appeal was by all the living defendants and the appeal was perfected by only one of them, the appeal was improperly taken and should be dismissed. This motion was reserved to the final hearing.

The only error assigned in the Appellate Court and in this court is the refusal of the court to strike said cause from the short-cause calendar.

M. H. HOEY, and ALBERT H. MEADS, for appellant.

MORAN, MAYER & MEYER, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

The motion to dismiss the appeal will be allowed. The right of appeal is a statutory right, and can only be availed of when allowed by the court, and must then be in conformity to the prayer for appeal and the order of allowance. Here the appeal was prayed and granted to three of the parties jointly and perfected by only one of them. It is not in compliance with the prayer or order of appeal. *Carson v. Merle*, 3 Scam. 168; *Hileman v. Beale*, 115 Ill. 355; *Ellison v. Hammond*, 189 id. 470; *Tedrick v. Wells*, 152 id. 214; *Town v. Howieson*, 175 id. 85.

*Appeal dismissed.*

WARREN SPRINGER

v.

HARRY DARLINGTON.

*Opinion filed February 17, 1904.*

1. **COLLATERAL ATTACK**—*what cannot be urged in collateral attack on foreclosure decree.* The action of the court, in a foreclosure proceeding, in appointing a special commissioner to make the sale and execute the deed instead of leaving those duties to the master in chancery cannot be questioned except in a direct proceeding to review the foreclosure decree.

2. **APPEALS AND ERRORS**—*when objection to deed executed in foreclosure proceedings cannot be made.* An objection that a deed executed to the purchaser at a foreclosure sale was void because made by a special commissioner appointed by the court instead of by the master in chancery cannot be urged on appeal, where no such objection was made when the deed was offered in evidence.

3. **LACHES**—*when doctrine of estoppel by delay does not apply.* The doctrine of estoppel by silence and delay by complainant in asserting his right in a party wall until after the wall had been built for several years, does not apply where his rights therein were not determined until just prior to the commencement of the suit, and where, when the wall was built, the defendant was the owner of the equity of redemption in the complainant's property and might have put his acts beyond question by making redemption.

4. **PARTY WALLS**—*a party wall means a solid wall, unless agreement provides otherwise.* An agreement between adjoining owners for a party wall means a solid wall, unless the agreement makes provision for openings therein.

5. **SAME**—*when equity is the proper forum to enforce party-wall agreement.* Where a party, in violation of his party-wall agreement, constructs a building with many windows in the wall, one who succeeds to the right of the other party to the agreement may, by injunction, compel the wall to be made into a solid wall in accordance with the contract, even though it does not appear what use complainant intends to make of his property or that there is an immediate necessity for closing the openings.

APPEAL from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This is an appeal from a decree of the superior court of Cook county, and the following statement of facts is taken, in part, from the recitals in the decree of that

court, which recitals are accurate so far as we have adopted them:

The appellee, complainant below, claims the title in fee simple to the property at 175 and 177 South Canal street, in the city of Chicago, which is known in this litigation as "complainant's lot." Appellant owns the property immediately adjoining on the north, at 171 and 173 South Canal street, and which is referred to herein as "defendant's lot." On May 21, 1889, Hibbert J. Lehman became the lessee of complainant's lot for the term of ninety-nine years, and afterwards, on the 18th of March, 1890, became the owner thereof in fee simple. On August 23, 1889, appellant was and at all times since has been the owner of defendant's lot, and on that day he and Lehman entered into a written contract providing for the erection of a party wall between them thirty inches in thickness, twenty-six inches of which was to stand on the complainant's lot and four inches of which was to stand on the defendant's lot. It was further provided that Lehman should erect this wall in the first instance, and that if Springer thereafter desired to use it he should pay one-half of the value of so much of the wall, in length, as he desired to use; and the contract also contained a provision that if it became necessary to repair or re-build the whole or any portion of the party wall, the expense was to be borne equally by them. The contract is perpetual, and is a covenant running with the land.

On the 8th day of March, 1890, Lehman conveyed complainant's lot to Frederick H. Winston, trustee, to secure the payment of \$275,000. During that year he erected a six-story brick building covering the whole of the lot, and on November 15, 1890, conveyed the lot, by warranty deed, to appellant. Shortly after the completion of the building on complainant's lot appellant erected a building on defendant's lot, using that part of the party wall extending one hundred feet from Canal street. Both

buildings were destroyed by fire on November 21, 1895. The \$275,000 debt remained unpaid. A foreclosure suit was brought and such proceedings were had that appellee and his co-trustee, who has since died, received, on September 7, 1899, a deed purporting to convey to them complainant's lot in fee simple, executed by Walter Butler, a special commissioner appointed by the circuit court of Cook county to execute the decree in the foreclosure proceedings.

In April, 1896, the appellant commenced, and shortly thereafter completed, the erection of a ten-story manufacturing building upon defendant's lot, and used a part of the original party wall which was still standing, being the east part of the wall, and used the foundation of the original party wall, as first built, throughout its entire length. Starting at Canal street, and running thence west a distance of forty feet, this wall, as constructed by Springer, is a solid wall, without openings. There is then an opening of nine feet and six inches in the wall. Continuing on west, there is then two feet more of wall, and then another opening of nine feet and six inches in the wall. These openings are continuous from the foundation to the highest story of the building, and with glass fronts facing complainant's lot. In the remainder of the wall, extending on west a distance of approximately seventy-five feet, there is one door and fifty window openings, five windows on each floor of the ten stories of the building, each having a stone cap and sill, which project several inches over the south face of the party wall.

When appellant constructed this building the foreclosure suit was pending, and he was the owner of the equity of redemption in complainant's lot, and so continued to September 7, 1899, at least. After appellee received his deed he found Springer in possession of the lot. Springer then claimed a perpetual easement in complainant's lot of an alley-way sixteen feet and five inches

wide, and also claimed a perpetual easement across the lot for steam pipes extending through complainant's lot, for the purpose of heating the building on defendant's lot and heating two other buildings owned by appellant in that immediate vicinity. For the purpose of preventing any interference with these alleged easements, appellant filed a bill for an injunction in the circuit court of Cook county, and a temporary writ issued on November 19, 1901. Afterwards, upon a hearing, the injunction was dissolved and the bill dismissed for want of equity. Appellant prosecuted an appeal to this court, where the decree was affirmed at the October term, 1902. *Springer v. Darlington*, 198 Ill. 121.

On November 25, 1902, appellee filed the bill in the present litigation in the superior court of Cook county, averring the foregoing facts, charging that appellant, if he desired to re-build said party wall, should have re-built it as a solid wall throughout its entire length, and praying that the openings in the wall be declared a nuisance; that defendant be enjoined from maintaining any of said openings in the wall; that the complainant be decreed the right to close all such windows and openings and make the wall a solid wall, and that thereafter an accounting be had between appellee and appellant.

Springer answered, denying, upon various grounds, that appellee was entitled to the relief sought, and averring, among other things, that appellee took no title to complainant's lot under his deed from Butler, as special commissioner. A hearing was had. The court found the wall in question had been re-built by Springer under the party-wall agreement, and that he should have built a solid wall for its entire length and height; that the openings therein, and the projecting window caps and sills, are a continuous nuisance to the complainant; that the complainant has the right to close all such windows and openings, remove the projecting caps and sills, and make the wall a solid wall for use as a party wall. Springer

is enjoined from maintaining the openings and from interfering with the complainant in closing the same up. The court retains jurisdiction of the cause for the purpose of taking an account between the parties after the openings shall have been closed up by the appellee, when the court will determine what amount, if any, is to be paid by either party to the other on account of the construction of such wall. Springer appeals to this court.

W. N. GEMMILL, (ALLEN C. STORY, of counsel,) for appellant.

LOESCH BROS. & HOWELL, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Appellant denies that appellee is the owner of complainant's lot, for the reason that in the decree of foreclosure, instead of directing the master in chancery to make sale, and, after the expiration of the period of redemption, a deed, in the event that the debt was not paid and no redemption had, the court appointed Walter Butler a special commissioner to perform these duties, and the sale was made and the deed executed by him as commissioner, and for the further reason that there is no evidence in this record that the sale in foreclosure was ever approved by the circuit court. If either of these positions be correct appellant would be the owner of the freehold claimed by appellee, as appellant was the holder of the equity of redemption in the lot at the time of the foreclosure. This, however, is in the nature of a collateral attack upon the decree of the circuit court. Whether the powers conferred upon the special commissioner were beyond those which the court could vest in such an officer is a question to be determined in a proceeding to review the decree in the foreclosure suit. So far as the absence of an order of confirmation is concerned, no such objection was made when the deed was offered. It cannot be urged for the first time in this court.

It is then insisted that as this wall had been constructed more than six years prior to the beginning of this suit, complainant's *laches* bars the relief sought, and that Darlington must have known at the time the wall was constructed that it was being constructed with openings, and that his silence then amounts to consenting that the wall should be so constructed. So far as the delay is concerned, it is apparent that when appellee received his deed Springer was asserting the right to use so much and such parts of complainant's lot that appellee might well delay bringing any suit in reference to the party wall until he ascertained the extent of his interest in the property. The claims of appellant in that regard were finally denied by this court in October, 1902, and this suit was begun the following month. We think reasonable diligence was exercised by appellee. When the wall was constructed appellant was the owner of the equity of redemption. If he paid the mortgage debt, as he had a right to do, his acts in constructing the wall with the openings in it could never have been questioned. He was building a wall on his own land. The doctrine of estoppel does not apply.

Other objections urged to the decree are, that appellee had an adequate remedy at law; that the injunction is not preventive in its character, and therefore is beyond the power of a court of equity; that Springer is the owner of the entire wall until he is paid for one-half, and that the decree is therefore wrong in permitting any interference therewith until Springer shall have been paid one-half the value of the wall as it now stands; that no wrong is now threatened by appellant, and that the wrong, if any, has been long since inflicted, and the court is powerless to forbid the doing of an act already done; that to permit appellee to re-build the wall in the manner authorized by the decree is to take the possession of appellant's property from him and place such possession in the hands of appellee, and that no injury is

shown to appellee, for the reason that he does not aver or show that he intends to erect a building on this lot.

The law in reference to party walls, as gathered from the decisions of the States of the Union, is clear and well defined. Where parties contract with each other for the maintenance of a party wall, a wall solid throughout its entire length and height is contemplated, unless the contract otherwise provides. The reason for this is obvious. Each party is the owner of that part of the wall which stands on his own land, subject to the easement of the other. This easement is the right of each to have his building supported by the portion of the wall which stands on the land of the other. This easement is to have the support of a wall—not of a wall weakened by such openings therein as the other party may see fit to make. If one party has a right to place openings in a wall, so has the other, and the exercise of such rights would lead to the loss of all benefit which should be derived from a party-wall contract. 22 Am. & Eng. Ency. of Law, (2d ed.) p. 246; *Sullivan v. Graffort*, 35 Iowa, 531; *Normille v. Gill*, 157 Mass. 427; *Harber v. Evans*, 101 Mo. 661; *Weems v. Mayfield*, 75 Miss. 287; *Traute v. White*, 46 N. J. Eq. 437; *Vollmer's Appeal*, 61 Pa. St. 118; *Milne's Appeal*, 81 id. 54; *Bloch v. Isham*, 28 Ind. 37; *Graves v. Smith*, 87 Ala. 450; *Dauenhauer v. Devine*, 51 Texas, 480; *Cutting v. Stokes*, 76 Hun, 376.

Appellant, in constructing the wall in the manner in which he did, violated the rights of appellee under the party-wall contract. Nor does it answer to say that appellee shall have no relief until he pays one-half the expense of the wall constructed. In the first place, it includes a part of the old wall and is constructed on the old foundation, one-half of which was paid for by Lehman, to whose rights appellee has succeeded. In the next place, to require appellee to pay one-half of the expense of such a wall as is now built between the parties is to require him to pay for a structure erected, not in accordance with the contract he made, but in accord-

ance with the desire and to answer the purposes of the appellant alone. It is true, it does not appear what character of building, if any, will be erected on the complainant's lot. That is a matter of indifference. Appellee's right is to have a compliance with the terms of the contract. It is not for appellant to say he will not comply because Darlington does not intend to use the property in a certain way. This wall, built where it is, in the manner it is built, necessarily depreciates the value of appellee's property. It is a private nuisance of a continuing character. No excuse whatever is offered for causing the caps and bases of the windows to project beyond the wall. A wall built on this foundation in accordance with the terms of the contract would add to the value of the property. Darlington is entitled to have the aid of equity to place the wall in the condition the contract required it should be. No other remedy is adequate. To compel him to resort to a suit for damages is to say that he shall be deprived of his real property without his consent by a private individual and must be content with such compensation as a jury will give him. Appellant does not possess the power of eminent domain. Appellee had, and has, the same right to build a wall on this foundation that appellant possessed, consequently there is no merit in the contention that the decree wrongfully deprives appellant of the possession of his own property.

In *Corcoran v. Nailor*, 6 Mackey, (D. C.) 580, it was said: "It is no answer to say that the dominant owner stands ready to fill up the openings whenever the servient owner desires to use the wall as a party wall. That very statement admits that it had not meantime been a party wall, and the servitude only renders lawful, occupation by an actual party wall. The occupation meantime by what is not a party wall is not the enjoyment of an easement, but is simply a trespass. \* \* \*

The injured party is entitled, therefore, to a discontinuance of the injury, and he is entitled to relief in equity.

An action of ejectment would be an inadequate remedy, for after recovery he would be at the cost and trouble of removing so much of the wall as stood on his land or filling up the openings. So, too, repeated actions of trespass would be an inadequate remedy. We repeat, therefore, that the complainant is entitled to relief in equity. He has a clear right to require that this illegal structure shall be conformed to the law authorizing party walls, and this can be done only by closing these openings, and by doing so in such manner as shall render the filled-up spaces suitable for support and for all the purposes contemplated by the right of joint use. The brickwork used in closing the openings should not be a mere patch, but should connect with the adjoining wall in the usual manner of a continuous wall. To this end a mandatory injunction is the proper remedy.—See *High on Injunctions*, secs. 332, 792, 852; *Phillips v. Boardman*, 4 Allen, 147; *Dauenhauer v. Devine*, 51 Texas, 480; *Sullivan v. Graffort*, 35 Iowa, 531."

In *Harber v. Evans*, *supra*, it was said: "Another objection raised to the validity of the ruling below is, that the petition does not allege that the plaintiff ever intends to use the party wall. This is true; but there are several answers to that objection. Whether plaintiff intended to use the wall or not is quite immaterial, since, under the contract, he had acquired a valuable right which was the subject of sale and transfer, which right was worthy of protection, and should be protected by a court of equity."

The views expressed in the *Corcoran* case and in the *Harber* case find support in the following decisions: *Everly v. Driskill*, 24 Tex. Civ. App. 413; *DeBaux v. Moore*, 32 N. Y. App. Div. 397; *Bartley v. Spaulding*, 21 D. C. 47; *St. John v. Sweeney*, 59 How. Pr. 175; *Vansyckel v. Tryon*, 6 Phila. 401; *Sullivan v. Graffort*, *supra*; *Vollmer's Appeal*, *supra*.

The relief granted in *Corcoran v. Nailor*, *supra*, and in *Bartley v. Spaulding*, *supra*, was of the same character as

that decreed in the case at bar. We regard the remedy here awarded as appropriate and fully warranted by precedent.

The decree of the superior court will be affirmed.

*Decree affirmed.*

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WILLIAM J. GALLAGHER v. THE PEOPLE,  
and

JOHN O'DONNELL v. THE PEOPLE.

*Announced orally February 4, 1904.*

1. CONSTITUTIONAL LAW—*constitution does not authorize appeals to Supreme Court in criminal cases.* Section 11 of article 6 of the constitution, which provides that appeals and writs of error shall lie from the Appellate to the Supreme Court in criminal and other specified cases, is a limitation upon the power of the legislature to make the Appellate Court's judgment final in such cases, and does not authorize an appeal in a criminal case, in the absence of legislation.

2. APPEALS AND ERRORS—*an appeal is purely statutory.* While a writ of error is in most cases a writ of right, an appeal is purely statutory, and in order to confer the right to an appeal there must be a statute prescribing the terms and conditions thereof.

3. SAME—*law does not provide for appeal in criminal case.* There is no statute in Illinois authorizing an appeal in a criminal case, and the manner of reviewing such a case is by writ of error.

MOTION in Supreme Court to consolidate appeals.

STEDMAN & SOELKE, for appellant Gallagher; WILLIAM DILLON, for appellant O'Donnell.

H. J. HAMLIN, Attorney General, for the People.

Mr. JUSTICE CARTWRIGHT announced the opinion of the court:

The appellants, O'Donnell and Gallagher, were convicted in the criminal court of Cook county for the crime of conspiracy. Gallagher was sentenced to imprison-

ment in the penitentiary and O'Donnell was sentenced to pay a fine of \$2000. The Appellate Court for the First District affirmed the judgment of the criminal court and allowed to the appellants separate appeals to this court, which were perfected by filing appeal bonds. Gallagher has filed in this court a complete transcript of the record and O'Donnell has filed a partial transcript and made a motion to consolidate his appeal with that of Gallagher, so that the appeals may be heard on the same transcript.

The law does not provide for an appeal in a criminal case. Section 11 of article 6 of the constitution authorizes the creation of Appellate Courts for the review, on appeal or writ of error, of such cases as the legislature may provide, and also provides that appeals and writs of error shall lie to this court from such Appellate Courts in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved. But that provision of the constitution does not authorize an appeal in the absence of legislation. It is merely a limitation on the power of the legislature to make the judgments of the Appellate Courts final in such cases, and is intended as a provision that if Appellate Courts are given power to review cases falling within those classes, such cases may be reviewed finally in this court upon appeal or writ of error. This was the construction given to that section in *Perry v. Bozarth*, 198 Ill. 328. Furthermore, an appeal is purely statutory, and there must be a statute prescribing the terms and conditions of an appeal in order to make a right to appeal effective. While in most cases a writ of error is a writ of right, the right of appeal is created and regulated by statute in connection with the constitution, and the right must always be exercised, in such cases, upon such conditions and by such persons as are authorized by the statute. There is no statute providing for appeals or fixing the conditions upon which they may be taken in criminal cases, but the manner of reviewing such cases is provided for by

division 15 of the Criminal Code, by writ of error, with provisions for *supersedeas* and letting to bail. Section 90 of the Practice act, relating to appeals from the Appellate Court to this court, and including cases of which the Appellate Court has no jurisdiction, provides that criminal cases may be removed to this court by appeal or writ of error, in the same manner provided by sections 67 and 70 of said act for appeals to the Appellate Court. The purpose of section 90 was to comply with the constitution by providing that criminal cases may be reviewed in this court. The sections of the Practice act therein referred to relate only to civil cases, and section 70 is limited, by its terms, to judgments or decrees in law or in chancery. Section 67 provides for an appeal bond to be framed with reference to the character of the judgment, and in the case of a sentence to imprisonment it would be nothing but a bail bond, while the Criminal Code commits the power to admit to bail to the discretion of the reviewing court or a judge of said court. To give a defendant a right of appeal in a criminal case would be to confer upon him the right, at his own will, to supersede the execution of the sentence, which was never intended. That can only be done by order of the reviewing court, or a judge thereof, upon an inspection of the transcript, in cases where there is a reasonable doubt as to the guilt of the defendant. There have been cases of appeals where the People have appeared and joined in error and submitted the cause for decision upon the errors assigned, which have been treated as being in the court upon writs of error in preference to dismissing the appeal, but in these cases there has been neither appearance nor joinder in error, and we are called upon by this motion to recognize the right of appeal. We can not consent to do that, and neither of the cases being in this court by any method prescribed by law, the motion is denied.

*Motion denied.*

PALMER MURPHY

v.

JAMES MURPHY *et al.**Opinion filed February 17, 1904.*

1. **APPEALS AND ERRORS**—*when amount involved is determined by the pleadings.* The amount involved, on appeal or error, in an action *ex contractu*, where there was no trial of an issue of fact in the lower court, is to be determined by the pleadings.

2. **SAME**—*accumulation of interest does not confer appellate jurisdiction.* The Supreme Court will dismiss a writ of error to review a judgment of the Appellate Court affirming a judgment in an action *ex contractu*, where there was no trial of an issue of fact and the amount claimed by the pleadings was less than \$1000, although the judgment, by reason of accumulation of interest, exceeds \$1000.

*Murphy v. Murphy*, 109 Ill. App. 41, writ dismissed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Vermilion county; the Hon. F. BOOKWALTER, Judge, presiding.

EDWIN WINTER, and GEORGE F. REARICK, for plaintiff in error.

BUCKINGHAM & DYSERT, for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The writ of error in this case was sued out to bring before us the record of a judgment of the Appellate Court for the Third District affirming a judgment of the circuit court of Vermilion county in favor of defendants in error and against plaintiff in error.

The suit in which the judgment was rendered in the circuit court was in assumpsit, and was commenced by defendants in error against plaintiff in error on September 19, 1898. The parties to the suit were the five children and heirs-at-law of Jeremiah Murphy, deceased.

Jeremiah Murphy was the owner of one hundred and sixty acres of land, which he devised by his will,—one-fourth to the defendant, Palmer Murphy, and the remaining three-fourths to his bodily heirs, who were the four plaintiffs and the said defendant. The cause of action was an alleged promise of the defendant, made in compromise of a threatened litigation and in consideration that plaintiffs would refrain from contesting said will, that the defendant would amend his bill of complaint in a suit for the partition of said land, and the prayer thereof, and cause a division and distribution of the land or its proceeds in the proportion of one-fourth to the defendant and three-fourths to the plaintiffs. The declaration alleged that complainants complied with their part of the agreement but defendant failed to amend his bill as agreed, and caused a decree of sale to be entered and a sale of the land to be made for \$6400, and the proceeds to be divided in accordance with the terms of the will instead of the agreement. Plaintiffs averred that defendant collected from the master in chancery who made the sale, \$924.40 more than his share of the proceeds by the terms of said agreement, and that was the amount which the plaintiffs claimed by their declaration. The amount involved in the suit was the difference between eight-twentieths of the net proceeds of the one hundred and sixty acres, to which the defendant would have been entitled under the will, and five-twentieths, which was the amount he was alleged to have agreed to take, which amounted to said sum of \$924.40.

To the declaration the defendant filed three special pleas: a plea of the Statute of Frauds, a plea of estoppel, and a plea of *res judicata*. To these pleas plaintiffs demurred, raising issues of law, first, as to the application of the Statute of Frauds; second, whether plaintiffs were estopped by having received from the master in chancery the shares to which they were entitled under the decree; and third, whether the decree in the parti-

tion suit was conclusive of the rights of the parties. The court sustained the demurrers to the pleas, and the defendant electing to stand by his pleas, the court entered judgment against him. There is no certificate of importance by the Appellate Court.

In all cases determined in the Appellate Court in actions *ex contractu* when the amount involved is less than \$1000, the judgment of that court is final and no writ of error can be sued out from this court to review it, and where there was no trial of an issue of fact in the trial court the amount involved is determined by the pleadings. Section 8 of the act to establish Appellate Courts, as amended in 1887, provides that in all actions where there was no trial on an issue of fact in the lower courts, appeals and writs of error shall lie from the Appellate Court to the Supreme Court when the amount claimed in the pleadings exceeds \$1000. (Hurd's Stat. 1899, p. 525.) In this case the declaration consisted of a single count, in which the amount claimed was \$924.40. This court, therefore, has no jurisdiction to issue a writ of error to review the judgment. It is true that the judgment entered in the circuit court exceeded \$1000, but the excess above the amount claimed in the declaration consisted of interest. The suit was pending from the time it was commenced, on September 19, 1898, to the date of the judgment, on January 20, 1902. It has been before the Appellate Court three times, and during its long pendency the interest accumulated. The amount involved in a suit is the amount in controversy at the time it is commenced, and the accumulation of interest afterward will not confer appellate jurisdiction. *Keiser v. Cox*, 116 Ill. 26; 2 Cyc. 563.

The writ of error is therefore dismissed.

*Writ dismissed.*

FREDERICK RABBERMANN

v.

THOMAS J. CARROLL.

*Opinion filed February 17, 1904.*

**LIMITATIONS**—*when renting land is not a recognition of title.* Renting land for pasturage without any lease describing the premises is not such a recognition of title as interrupts the running of the Statute of Limitations in favor of the tenant as to a strip of land which had for many years been enclosed with the land of the tenant adjoining the tract rented for pasturage.

**APPEAL** from the Circuit Court of Madison county; the Hon. B. R. BURROUGHS, Judge, presiding.

BURTON & WHEELER, for appellant.

SPRINGER & BUCKLEY, and E. B. GLASS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is a suit in ejectment, filed October 7, 1898, in the circuit court of Madison county, by Thomas Carroll against Frederick Rabbermann. The land in dispute is a small strip lying between the farms of plaintiff and defendant, Carroll claiming the property by reason of record title and Rabbermann claiming by reason of adverse possession for twenty years. The property owned by Rabbermann was previously owned by Alvis Hauskins, and that owned by Carroll was previously owned by a man by the name of Long. In 1867 Hauskins built the first fence between the two farms, and as there were no corners established, and the land being timber land, he was compelled to guess at the line, and from the survey afterwards made it appears he went too far south and on to the Carroll tract. The fence remained in the same place until the year 1876 or 1877, when Hauskins moved it north about twenty-five feet, making a road south of the fence for his own convenience. About this

time Hauskins rented the Long tract, now owned by Carroll, for pasture, and paid the taxes for the use of the same until he sold to Rabbermann, in the year 1880. Rabbermann, after purchasing the Hauskins land, had possession of the Long tract upon the same terms as his grantor, for a year or so.

There have been two trials of this case in the circuit court, the first resulting in a verdict in favor of appellant. Appellee paying the costs, obtained, under the statute, a new trial, upon which trial a verdict and judgment were obtained in favor of appellee. Appellant prayed an appeal, and assigns of record various errors, but inasmuch as the error assigned relative to the court giving appellee's sixth and seventh instructions is fatal to the whole proceeding, under our view of the law it alone will require our attention.

Appellee's sixth and seventh instructions are as follows:

6. "The court instructs the jury that they are not to include any time that the defendant or his grantor, Alvis Hauskins, had possession of the strip of land in question as tenants in making up the period of continuous possession on part of the defendant or his grantor, required by law to defeat the record title of plaintiff, as explained by the instructions of the court given you in this case.

7. "The court instructs the jury that if they believe, from the evidence, that the defendant's grantor, Alvis Hauskins, became a tenant of the premises owned by the plaintiff's grantor, and occupied it for several years as such tenant before the full period of twenty years had elapsed, then the continuity of possession became broken and the jury should find for the plaintiff, unless the jury believe, from the evidence, that the defendant and his grantor, Alvis Hauskins, had adverse possession of the land in dispute for a period of twenty years after the expiration of such tenancy and prior to the bringing of this suit, March 22, 1889."

Of the sixth instruction, *supra*, it may be said that it assumes that the evidence shows that Hauskins, appellant's grantor, had possession of the strip of land in question during part of the period of the Statute of Limitations as tenant of the title owner thereof, instead of submitting to the jury that question as a question of fact, as the instruction should have done. The seventh instruction tells the jury that if Hauskins, appellant's grantor, "became a tenant of the premises owned by the plaintiff's grantor, and occupied it for several years as such tenant before the full period of twenty years had elapsed, then the continuity of possession became broken and the jury should find for the plaintiff, unless the jury believe, from the evidence, that the defendant and his grantor, Alvis Hauskins, had adverse possession of the land in dispute for a period of twenty years after the expiration of such tenancy and prior to the bringing of this suit." All that is stated in this instruction might be true and appellant still be entitled to recover. The question was, what was the extent of the ownership of plaintiff's grantor and of the plaintiff? If the plaintiff only owned south of the fence in question, as shown by the evidence, and appellant's grantor only leased and used that portion south of the fence as tenant, or if, in any event, Hauskins only leased that portion of the land south of the fence, then it must be apparent that the lease would in no way affect his right or the right of his grantee, appellant. The principle of law which makes the leasing of land by one claiming ownership by virtue of adverse possession from the title owner thereof a bar to his right to so claim as adverse holder during such tenancy, goes upon the ground that by so leasing the tenant recognized the title of the lessor to the premises and holds subservient to the lessor's title, and therefore cannot assert that he holds adversely to the lease which he has accepted and holds under. If the evidence in this

case shows, as we think it tends to show, to say the least, that appellant and his grantors had the strip of land in controversy fenced in with and as a part of the lands owned by appellant's grantor and by appellant as grantee, and that appellant's grantor simply leased that portion of appellee's land from appellee's grantor that lay south of appellant's and appellant's grantor's fence, not leasing by any legal description but leasing simply that within the enclosure for pasture purposes, then it cannot be said, as we think, that such leasing had anything whatever to do with the strip of land in controversy; and upon such state of facts as is supposed in the latter case, the instructions above mentioned were erroneous and in direct conflict with the rule laid down by this court in the case of *O'Flaherty v. Mann*, 196 Ill. 304, in which case, on page 308, we said: "The mere fact that Mann entered into possession of lot 1 under a lease or by license of the appellant five or six years after he had enclosed with lot 3 the strip in controversy, would constitute no reason why the running of the statute should be suspended, when the original holding of this strip was open and adverse, and distinct acts of ownership were continuously exercised by Mann over it up to the time of his death. \* \* \* Had there been no partition fence or acts of ownership exercised by Mann over the strip, there might then have been no adverse possession for twenty years, but from his conduct it is plain that he claimed ownership over this strip, enclosed it with his own, laid it out and improved it," etc.

In the case at bar the evidence tends to show the conditions were similar to those in the case above cited. The land south of the division fence was used for pasture and that on the north was used in farming, being cultivated in wheat and corn and used in common as a part of appellant's farm. Appellant and his grantors had cleared the timber from the land in dispute, or from a considerable portion of it, and had for nearly twenty

years, at the time of the alleged tenancy, occupied it and used it as their own land, and continued so to hold and use it during the alleged tenancy. As we have said, the tenancy was simply for appellant's use as pasture and the rent was merely the payment of the taxes. There was no written lease or other lease giving a legal description of it, and in such case it cannot be said that such use and occupancy of that portion of the land that was south of the fence could legally or necessarily affect the question of ownership of the disputed tract in any way, and we can see no reason, under the circumstances here disclosed, why the tenancy of the Carroll tract by appellant and his grantor could operate as a bar to the running of the Statute of Limitations or militate against appellant's claim of ownership, by reason of adverse possession.

The appellant further complains of the refusal of the court to give his fifth and sixth refused instructions. We think neither of these instructions was accurately drawn. While, in the main, they stated correct legal propositions, the fifth instruction was defective in that it did not state what elements were necessary to create an adverse holding, such as would constitute ownership by the running of the twenty years statute; and the sixth refused instruction contained the same vice with appellee's sixth instruction that was given, in that it assumes that the evidence shows that appellant's grantor and appellant leased or rented only that part of the ground south of the old fence. It was a question for the jury as to what lands were in fact held under the lease, and the instructions should not have assumed anything upon that question unless the evidence was all one way and undisputed.

What is said in relation to the facts in this opinion is not to be regarded as a finding of fact by this court. For our discussion of the instructions we merely assume the facts as contended by the parties, but express no opinion

as to what facts are established by the record, inasmuch as the case must be remanded generally for a trial *de novo*.

We regard the giving of the above mentioned sixth and seventh instructions in behalf of appellee as such error as must reverse the judgment, which is accordingly done, and the cause is remanded to the circuit court of Madison county for such further proceedings as to law and justice shall appertain.

*Reversed and remanded.*

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ANDREW GRAY *et al.*

*v.*

LORENA LAMB *et al.*

*Opinion filed February 17, 1904.*

1. LIMITATIONS—*possession must be exclusive to be notice of rights under unrecorded deed.* Possession must be open, visible, exclusive, and of such a character that it will not be likely to be misunderstood, in order to operate as notice of the possessor's rights under an unrecorded deed.

2. REAL PROPERTY—*widow's latent equities waived by joining in deed by owner of record title.* Latent equities of a widow under an unrecorded deed to her first husband are waived where she joins in a deed by her second husband, who holds an apparently perfect record title to the property, running back to the government.

APPEAL from the Circuit Court of Kendall county; the Hon. GEORGE W. BROWN, Judge, presiding.

SEARS & SMITH, for appellants.

A. C. LITTLE, for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

The bill in this case was filed by Lorena Lamb and Ruth Strausman, daughters, Isaac Bartlett, son, and Perly and Wallace Bartlett, children of John Bartlett, a deceased son, claiming as heirs of Aaron Bartlett, de-

ceased, in the circuit court of Kendall county, Illinois, on or about the 17th day of July, 1900, to set aside a warranty deed purporting to have been made, executed and delivered by Sylvanus Bartlett to one Andrew Gray, to lots 5 and 8, in block 14, in the original village of Oswego, Kendall county, Illinois, and dated on or about October 28, 1895, and also to compel Gray to account for the rents and profits for the use of said lot 8, of which Gray, by his tenant and son-in-law, Hildebrandt, has been in possession since about April, 1897.

The record shows that about 1840 Aaron Bartlett, with his family, settled in Oswego, Kendall county, Illinois, on the premises in controversy in this suit, and in 1842 obtained, but never recorded, a warranty deed for said lots 5 and 8 in controversy here. He immediately proceeded to build a house on lot 5, into which he moved with his family, where he resided until his death, in 1843. On lot 8 he built a blacksmith shop. He died intestate and his estate was never probated. After his death his wife, Phebe, and children, continued to occupy said premises until April, 1845, when she married Sylvanus L. Bartlett, a bachelor brother of the deceased, Aaron Bartlett, who came to Oswego a year or so after said deceased. After the marriage of Sylvanus and Phebe they continued for some time to reside on the premises in question. In 1847 Sylvanus obtained a warranty deed from Lewis B. Judson and wife, original grantors in the deed to Aaron, to said lots 5 and 8, and also a strip of land twelve feet wide off the south-west side of lot 4, in the same block. This deed was filed for record February 1, 1854, and duly recorded. In 1855 Sylvanus Bartlett and wife conveyed said lots 5 and 8, by warranty deed, to Jane C. Gibbs, having traded said lots for a sixty-acre farm, to which they moved and where they resided until 1859. The property thus conveyed to Gibbs and in question in this proceeding was thereafter conveyed several times by warranty deeds, until, in 1859, Sylvanus Bart-

lett re-purchased lots 5 and 8 from Abraham B. Staut, who, his wife joining therein, executed and delivered to Sylvanus a warranty deed for the premises conveyed. On January 12, 1859, Sylvanus had conveyed to him, by warranty deed from Paul G. Hawley and wife, a strip twelve feet wide off the south-west side of lot 4, in block 14, in Oswego, and also the alley between lots 4 and 5, in said block, which deed was duly filed and recorded. The record title to this property remained in Sylvanus Bartlett until March, 1895, when he and his wife, in consideration of future support, conveyed the same, by warranty deed, to William H. Marion, a grandson, but shortly thereafter said Marion concluded that he did not wish to assume such responsibility, and in April, 1895, by warranty deed, he re-conveyed said property to Sylvanus Bartlett. In July, 1895, Phebe, wife of Sylvanus, died, after which the old man, Sylvanus, continued to hold the record title to and resided on said property until October, 1895, when, in consideration of future support for the balance of his life and christian burial at his decease, he conveyed said property, by warranty deed, including lots 5 and 8, the twelve-foot strip and said alley, to Andrew Gray, the principal defendant herein, and nephew, by marriage, to Sylvanus.

Andrew Gray defends this suit on the theory that he is an innocent purchaser for value and claims a perfect record title; that if complainants ever had any rights herein they have lost them by the seven and twenty year statutes of limitation, and claims that complainants are guilty of *laches*. The position of complainants is, that Aaron Bartlett had a paper title to lots 5 and 8 when he died; that on his death his children became the owners thereof, subject to the homestead and dower rights of the widow; that her possession, as the wife of Sylvanus, until 1895, with Sylvanus, prevented the Statute of Limitations from running until her death, in 1895, and that within seven years thereafter this suit was insti-

tuted, and that therefore the sole possession of Sylvanus, after the death of his wife, has not precluded the assertion of title by the heirs of Aaron Bartlett, the complainants in this suit.

The case was referred to the master to take the evidence and report his conclusions. The master found that Aaron Bartlett had title, at the date of his death, to lots 5 and 8; that the widow of Aaron continued to reside on the property until her death, she having married Sylvanus, a brother of Aaron; that after her death, in 1895, the title became absolute in complainants. To the findings of the master Andrew Gray filed objections, which were overruled, and by agreement said objections stood as exceptions before the trial court. The court affirmed the master's report, with the exception of the allowance to Andrew Gray of one item of expense disallowed by the master, and entered a decree fixing the title to said lots 5 and 8 in the complainants and setting aside the deed to Gray.

Upon a review of the record in this case we are of the opinion that the findings and conclusion of the master and the decree of the trial court are erroneous and that said decree should be reversed. Andrew Gray assumes the position of an innocent purchaser for value of premises in the possession of his grantor, and who held a straight record title, with no apparent imperfections. From the evidence we are able to glean nothing that substantially controverts this position. The record title of Sylvanus Bartlett was absolutely clear, running back to the government without a break. The occupancy of these lands by Phebe, the widow of Aaron, after her marriage with Sylvanus, was no such possession as would require other persons to take notice of rights that may have inured to her as the widow of Aaron Bartlett and through the unrecorded deed. "Possession, before it can be held to operate as notice of an unrecorded deed, must be 'open, visible, exclusive and unambiguous, such as is

not liable to be misunderstood or misconstrued.' \* \* \* Such a possession must be of an open and visible character, which will be calculated to apprise the world that the property has been appropriated and is occupied, and the occupancy must be exclusive. 'If only used and enjoyed in common with others, or with the public in general, it could not be regarded as hostile to others claiming title.'" (*Robertson v. Wheeler*, 162 Ill. 566.) The wife of Sylvanus Bartlett, whatever may have been her equitable rights under the unrecorded deed to her former husband, by joining, as wife, in the warranty deed executed to Jane C. Gibbs, in 1855, by Sylvanus Bartlett, who held a clear record title, gave notice to the world that she possessed no latent equities in the premises conveyed.

The evidence shows conclusively that Sylvanus Bartlett, in 1859, under the warranty deeds from Abraham B. Staut and Paul G. Hawley, went into possession of the lands conveyed in the deed to Gray; that until the execution of the deed to Gray, Sylvanus treated said lands, so far as the world could discern, as his own. Complainants, however, contend that they, or some of them, paid the taxes on said premises for a considerable portion of this time, and that for the last fifteen years of the time that Sylvanus held the record title to this property, William H. Marion, grandson of Sylvanus, paid the taxes. There is nothing, however, to show that the complainants, in furnishing such money as they did to pay the taxes, did so to protect any rights possessed by them, but the evidence does indicate that such contributions were donations to their step-father, as a good deal of the time, at least, the money was paid to Sylvanus and he paid the taxes himself. As to Marion, he did not have, or claim to have, any interest whatever in the land.

Andrew Gray swore that he had no knowledge of the old unrecorded deed to Aaron Bartlett, nor of complainants' alleged rights under it. The complainants them-

selves testified that they never said anything to Gray or to Sylvanus about said deed or their claims under it. Sylvanus testified that he never saw the old deed from 1842 until 1900, when it was produced in the trial of a forcible detainer suit brought by Gray against Sylvanus and Morris B. Lamb, husband of Lorena Lamb, one of the complainants in this suit, who were at that time living on a portion of this property. Sylvanus testified that he used the property as his own for nearly forty years, and that he thought it was his. The evidence shows that several, if not all, of the complainants, within a month thereafter knew of the contract between Sylvanus and Gray, and that Gray had been deeded this property under the agreement to take care of Sylvanus during the balance of his life and give him christian burial at his decease, and knew that Gray was furnishing provisions under this contract, yet they never hinted to him anything of their claims to the property in dispute until the filing of their bill, nearly five years thereafter, and they permitted Gray to go ahead and defray the funeral expenses at Sylvanus' decease. William Marion, to whom this property was deeded in 1895 for the same purpose that it was conveyed to Gray afterwards, testified that he supposed Sylvanus owned the property; that he took a warranty deed therefor from Sylvanus, but tiring of his responsibility under the agreement he re-conveyed the property to Sylvanus. He was a grandson, and was certainly in as good a position to know the rights of his relatives in the premises in dispute as would the defendant Gray. Gray testified that Sylvanus was begging for the necessities of life and applied to him for assistance, and against his inclinations forced on him the deed and contract in question for the purpose of securing the necessities of life and decent burial at his death. It does not appear from the evidence that the expectation of life of Sylvanus and the value of the property at the time the deed was made to Gray were such as to

render the bargain entered into by Gray a one-sided or unconscionable one.

We think the evidence in this case conclusively shows that the defendant Gray was an innocent purchaser for value, and what was said in *McNab v. Young*, 81 Ill. 11, is applicable to the facts disclosed in the record in this case (p. 15): "For aught appearing, the purchase by Clayton was in good faith, and those made of him by his co-defendants were also in good faith and with no notice of any infirmity in the title offered to be sold. How could purchasers know from the record there was fraud in the transaction or invalidity in deeds? They all appeared fair on the record, and there was nothing *dehors* the record to admonish those desirous of purchasing, of any danger or doubt. Appellant knew for four years the legal title had passed to Parsons but made no effort to divest him. He must have known of Parsons' sale to Clayton and of Clayton's various sales, as he was frequently in Chicago, but he made no objection. He did not interfere until the property had passed into various hands and become very valuable."

With the undisputed evidence showing that in 1855 Sylvanus Bartlett was joined by his wife, Phebe, in a conveyance to Jane C. Gibbs of the property in question, and moved away from said premises on to a farm owned by Sylvanus, where they remained four years, during which time the property in question was conveyed several times until the title finally rested in one Staut, who conveyed the same back to Sylvanus Bartlett, in 1859, for the consideration of \$1200, we are unable to see how the master or chancellor reached the conclusion, as a matter of fact, that Phebe Bartlett held possession of the premises in controversy from the death of her first husband, Aaron, to the time of her death, as the foundation of the claim of the appellees. Moreover, the record shows that when Aaron Bartlett died he left five children: Sarah, who was then about twelve years of age,

and who died somewhere near the age of twenty; Ruth, one of appellees, now aged sixty; Lorena, another of appellees, aged sixty-one; Isaac, another of appellees, aged sixty-six; and John, who died about the year 1899, aged sixty-eight, who was the father of appellees Wallace and Perly Bartlett, and the record shows that the ages of the latter two grandchildren are above twenty-four years. There is no pretense that any of the children or grandchildren had any continuous residence on this property since about the close of the war, and then, about that time, the daughter Lorena and the son John occupied a little house, aside from the home house, on one of the lots, but surrendered the same when requested by Sylvanus, that the same might be used by him for a shop; so that there is no evidence of such possession by any one as could be said to have saved or preserved the rights of appellees in this property, or as having a tendency to give notice to or put upon inquiry Andrew Gray, the purchaser, of any equities they had or might have had by reason of the unrecorded deed mentioned in the bill. And the evidence very clearly shows that although the children of Aaron had knowledge of the existence of the old unrecorded deed, it also shows that they made no claim or had any idea that they had any rights under or by virtue of this deed until shortly before the bringing of the suit in question. We regard the evidence in this case as wholly inadequate to sustain the decree rendered herein. To hold otherwise would be to render nugatory the recording laws of this State and titles to lands unstable.

It is not necessary for us to discuss other contentions made in this case, as, for the reasons stated, the decree will be reversed and the case remanded to the circuit court of Kendall county, Illinois, with directions to dismiss complainants' bill.

*Reversed and remanded, with directions.*

CORINNE RUDOLPH

v.

ELIZA RUDOLPH *et al.**Opinion filed February 17, 1904.*

1. **WILLS**—*will presumed to have been made in view of existing statutes.* It will be presumed, in the absence of anything in the will to show the contrary, that the will was made in view of statutes then existing, and that the same were intended by the intestate to prevail in case of a contingency not provided for in the will.

2. **SAME**—*effect of section 11 of Statute of Descent on devise to children as a class.* Under section 11 of the Statute of Descent, for the prevention of lapses, where the devise is to the testator's children, equally, if one of the children dies before the testator, leaving issue, who survive the testator, and no provision is made for such contingency, such issue will take the deceased child's share, notwithstanding the devise was to the children as a class, and not by name, although they were all in being when the will was made.

**APPEAL** from the Circuit Court of St. Clair county; the Hon. **WILLIAM HARTZELL**, Judge, presiding.

This is a bill for partition, accounting, etc., filed on August 28, 1902, (and afterwards amended on June 8, 1903, for the purpose of making Fannie Rudolph a party) by Eliza Rudolph (in her own behalf and as conservatrix of the estate of Frederick W. Rudolph, deceased), and Minnie A. Rudolph, and Edgar Rudolph, against Herman Rudolph, Aurelia Rudolph, Corinne Rudolph and Fannie Thornbury Rudolph.

It appears from the pleadings, proofs, and findings of the master and chancellor below, that Frederick W. Rudolph died testate in the month of July, 1902, leaving a will, dated March 15, 1875; that, at the time of his death, Frederick William Rudolph was, and for some years prior thereto had been, insane; that Eliza A. Rudolph on January 31, 1889, had been appointed by the county court of St. Clair county conservatrix of his estate, and continued to act as such conservatrix until his death; that Frederick William Rudolph left surviving him his widow,

said Eliza A. Rudolph, and three children, to-wit, Minnie A. Rudolph, Edgar W. Rudolph and Herman Rudolph, and two grandchildren, to-wit, Aurelia Rudolph and Corinne Rudolph, children of Henry Rudolph, a deceased child of the said Frederick William Rudolph; that the said Henry Rudolph died July 7, 1900, before the death of his father, Frederick William Rudolph; that Henry Rudolph left surviving him a widow, named Fannie Thornbury Rudolph, and two children, to-wit, Aurelia Rudolph and Corinne Rudolph; that the said Aurelia was the child of Henry Rudolph's marriage with one Annie Schubert, from whom he was divorced; that Corinne Rudolph was the issue of Henry Rudolph's second marriage with Fannie Thornbury Rudolph, his widow, who is still living; that Herman Rudolph is insane, and confined in an asylum at Anna; that Frederick William Rudolph died seized in fee simple of three certain lots in Belleville, one of which, to-wit, the west half of lot 8, survey 378, is occupied, and has been occupied from a date prior to the insanity of Frederick W. Rudolph, as the homestead of the widow, Eliza A. Rudolph.

Aurelia Rudolph, Corinne Rudolph and Fannie Rudolph answered the bill, admitting the death of Frederick William Rudolph and the statement of heirship as alleged in the bill, but denied the allegations of the bill as to the extent of the interests of the parties. Guardians *ad litem* were appointed for the minor, Corinne Rudolph and for the insane person, Herman Rudolph. A copy of the will of Frederick William Rudolph was attached as an exhibit to the bill. The second, third and fourth clauses of the will are as follows:

"*Second*—I hereby give and devise to my beloved wife, Eliza A. Rudolph, in consideration of the love and affection, which she has always shown to me, and of the confidence which I repose in her, all of my real and personal estate and property, money, goods, chattels, demands and claims, which I may leave at the time of my death,

for her lifetime; in order that my said wife, the said Eliza A. Rudolph may, during her natural life, enjoy the benefits, and draw the interest and rents of said real and personal property.

"*Third*—It is my will that my wife, said Eliza A. Rudolph, shall have power and be authorized after my death to sell any or all of said real and personal property at public or at private sale, if she should consider it to her interest to do so, and then enjoy the rents and interest of the proceeds of such sale during her lifetime.

"*Fourth*—After the death of my said wife, Eliza A. Rudolph, I give and devise all my real and personal estate and property, money, goods, chattels, demands and claims to my beloved children, as their absolute property in fee simple, to be equally divided between them."

The cause was referred to a master in chancery, who reported the facts and his conclusions. The master found in his report that, under clause 4 of the will, as above quoted, and by the bill and answer, it was put in issue whether or not the distribution of the estate should be confined to the three surviving children of said Frederick W. Rudolph, or whether the children of said Henry Rudolph, deceased, should participate in such distribution, and take the portion which their father would have taken, were he alive at the time such distribution was made; that the word, "children," as used in this will, is intended to designate a class of persons or devisees, to-wit: the immediate offspring of the testator, and that it should not be construed to include grandchildren, inasmuch as there is nothing appearing in the context of the will to show, that such a construction would be consistent with the intention of the testator; that the distribution of the estate should be confined to those of this class, who were *in esse* at the time the devise took effect, to-wit, the death of the testator; that Aurelia and Corinne Rudolph, children of Henry Rudolph, deceased, do not belong to the class designated by the testator as and

for his devisees; that the premises are subject to partition in the following proportion: Herman, Edgar and Minnie Rudolph, children of the testator, are each entitled to an undivided one-third, subject to the life estate of said Eliza A. Rudolph in all of said premises, and her homestead in said west half of lot 8; that Henry Rudolph, not having been seized of any portion of said premises during his intermarriage with either Annie Schubert or Fannie Thornbury, neither of the latter persons is entitled to dower in any part of the premises. Exceptions were filed to the report of the master, which were overruled by the court, and a decree was entered in accordance with the findings of the master. The present appeal is prosecuted by Corinne Rudolph, who excepted to that part of the master's report, which found that the children of Henry Rudolph took nothing under the will.

The present appeal is prosecuted from the decree of the court, overruling the exceptions to the master's report as above stated.

WILLIAM P. LAUNTZ, and WILLIAM U. HALBERT, for appellant.

R. W. ROPIEQUET, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The question, presented by the record, is whether or not the circuit court decided correctly in holding that Herman, Edgar and Minnie Rudolph, the children of the testator, Frederick William Rudolph, who were living at the time of his death, were each entitled to one-third of the premises sought to be divided, subject to the life estate of the widow, Eliza A. Rudolph, and in holding that Aurelia Rudolph and Corinne Rudolph took nothing under said will. In other words, the contention of the appellant is that Herman, Edgar and Minnie Rudolph inherited each an undivided one-fourth of the premises,

subject to the life estate of the widow, Eliza A. Rudolph, and that Aurelia Rudolph and Corinne Rudolph, the children of the deceased son, Henry Rudolph, inherited the other one-fourth thereof, each being entitled to an undivided interest of one-eighth. The decision of the question involved requires a construction of the will, and of section 11 of chapter 39 of the Revised Statutes, being "An act in regard to the descent of property."

By clause 4 of the will of Frederick William Rudolph, it is provided as follows: "After the death of my said wife, Eliza A. Rudolph, I give and devise all my real and personal estate and property, money, goods, chattels, demands and claims, to my beloved children, as their absolute property in fee simple, to be equally divided between them." When the will was made in 1875, the testator, Frederick William Rudolph, had four children, to-wit, Herman Rudolph, Edgar W. Rudolph, Minnie A. Rudolph and Henry Rudolph. But Henry Rudolph died in 1900, two years before his father, Frederick William Rudolph died, so that, at the time of the death of the latter, there were only three children, instead of four, to-wit, Minnie, Edgar and Herman. The question is, did the children of Henry Rudolph, who died before his father, to-wit, Aurelia Rudolph and Corinne Rudolph, take under the will the same interest, which their father, Henry Rudolph, would have taken, if he had lived until after the death of his father, the testator, Frederick William Rudolph.

On the part of the appellees it is claimed that, by section 4 of the will, the devise was to a class, to-wit, the children of the testator, without a statement of the names of the children. The general rule is that, where the devise is to a class, the remainder vests in the survivors of that class who are alive at the death of the testator, as the estate vests and the class is determined at that time. A will takes effect at the death of the testator. (*Scofield v. Olcott*, 120 Ill. 362).

"It is believed to be universally true that, where there is a simple devise to a class, and the will does not, expressly or by necessary implication, fix the time when the objects of the gift are to be ascertained or when distribution is to be made, the law itself will fix it at the testator's death, that being the time when the will first speaks. \* \* \* Strictly speaking, in contemplation of law, the class, to whom a gift or devise is limited, consists, in all cases, exclusively of such persons, coming within the description of the class, as are *in esse* at the time the gift or devise, by its own limitation, takes effect in interest, and such as are born before distribution, where distribution is deferred to a subsequent period. Those, that die before the gift takes effect in interest, are not regarded as having ever belonged to the class. \* \* \* Where the gift or devise is to a class, none will be permitted to take, except such as are *in esse* at the time of distribution." (*McCartney v. Osburn*, 118 Ill. 403). Under the common law as interpreted by this court, the whole estate in such case inures to the survivors of the class. (*Lancaster v. Lancaster*, 187 Ill. 540).

These principles are said to be applicable to the facts of the present case, and it is said that, the devise being to a class, to-wit, the children of Frederick William Rudolph, those, who belonged to that class at the time of his death, took the property as the survivors of the class; that, although there were four children in existence at the time the will was made in 1875, to-wit, Henry, Herman, Minnie and Edgar, yet, when the testator died in 1902, there were only three children living, Henry having died before the death of his father, to-wit, in 1900; and that the class, which at the time of the making of the will, consisted of four children, consisted, at the time of the death, only of three children. It is then argued that, inasmuch as the class is the devisee which takes, and not the individuals of the class, the three children, who were survivors at the death of the testator, took

the property to the exclusion of the children of the son, who died before his father died.

There is no doubt that the position thus taken by the appellees is correct, unless section 11 of the Statute of Descent modifies it. Section 11 of the Statute of Descent is as follows: "Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, and if there be no such issue at the time of the death of such testator, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate." (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1433).

The language of the statute is, "whenever a devisee or legatee \* \* \* being a child or grandchild of the testator shall die before such testator," etc. It is said that the section contemplates a case where the legatee or devisee, who dies before the testator, is an individual, and as such is mentioned by name.

In some of the States courts have held that statutes for the prevention of lapses, such as section 11 of our statute in regard to descents, do not affect the pre-existing rule upon the subject of gifts to classes; that is, that the whole estate inures to the survivors of the class, and that the will creates a vested remainder in those of the children, who are alive at the death of the testator, the class being determined at that time. This is the common law rule, and, in support of its continuance notwithstanding the statute for the prevention of the lapse, the doctrine is invoked that statutes are to be construed in accordance with the principles of the common law, and that the legislature will not be presumed to have intended to make any innovation upon the common law further than the case absolutely requires; (*Smith v. Laatsch*,

114 Ill. 271; *Mackin v. Haven*, 187 id. 480); and it is insisted that, in this class of cases, the common law rule continues to exist as to devises to classes; and that the statute must be construed to refer only to cases where the individuals of a class are mentioned by name. This construction seems to have support in the language of the section, which refers to "a devisee or legatee."

In Page on Wills, (sec. 551,) after mentioning the common law rule that, when a member of a class of beneficiaries dies before the time fixed under the will for determining the members of that class, the children and descendants of such deceased member could not take in place of their ancestor, it is said: "This rule is further modified by statutes, which have been passed in different jurisdictions, providing that, if certain named beneficiaries die before testator or before their interests vest, their descendants shall take the share, to which their ancestor would have been entitled. These statutes apply generally when the beneficiary is a descendant or blood relative of testator. In some States it has been held that these statutes do not affect the pre-existing rule upon the subject of gifts to classes. The reason, which the courts give for this rule, is that indicated by the preceding note, that is, that the statutes against lapse apply only where something is given by will to one who dies before testator, and; therefore, have no application to gifts to a class, where the gift is in legal effect only to the members of the class in existence at a designated time."

In the same section, however, the same author makes the following statement: "In most States these statutes are held to apply to gifts to classes, as well as to gifts to individuals. It makes no difference whether the bequest is such to a relative by name, or whether he is designated in the will only by his relationship." A large number of authorities are referred to in the notes, which sustain the view that these statutes apply to gifts to

classes, as well as to gifts to individuals, and the great weight of authority seems to be in favor of this construction.

In 18 Am. & Eng. Ency. of Law,—2d ed.—p. 757, it is said: "In the United States it is generally considered that statutes for the prevention of lapses apply in the case of a legacy or devise to several, as a class, though none be mentioned by name. \* \* \* Statutes for the prevention of lapses are intended, not to defeat the will, but to supplement it, and ought not to control if it be inconsistent with the will to have them control. But it must be presumed that the testator made the will in view of the statute, and that he intended to have the statute prevail, unless the contrary appears. The burden of showing the contrary is on the party claiming that the statute does not apply, and this burden is not lifted when it is made to appear that the legacies were prompted by personal regard for the legatees, for the fact, that they were so prompted, is not at all inconsistent with an intent to have them go to the descendants of the legatees, in case the legatees themselves die before the testator. The person, claiming that the statute does not apply, must go further and make it appear that the legacies were not only prompted by personal regard, but that they were intended to be purely personal gifts, and were intended not to go to the descendants of the legatees under the statute."

In the case at bar, section 11 of the statute in regard to descents was in force when Frederick William Rudolph made his will in 1875, and it must be presumed that he made his will in view of the statute, and that he intended to have the statute prevail. Nothing to the contrary appears in the will. On the contrary, it would appear that it was the intention of the testator that his four children should take. At the time he made his will, he had four children, because at that time Henry was alive. He says: "After the death of my said wife, Eliza A. Ru-

dolph, I give and devise all my real and personal estate, etc., to my beloved children as their absolute property in fee simple to be equally divided between them." The words, "to be equally divided between them," have a significance here, as indicating that the intention was to give the property to the individuals, who constituted his children at that time. The case of *Arnold v. Alden*, 173 Ill. 229, is referred to by counsel for appellee, as indicating that the word "children" denotes immediate offspring and will not be construed to mean grandchildren, unless a strong case of intention or necessary implication requires it. But the case of *Arnold v. Alden*, *supra*, has no application here, for the question is not in regard to the sense, in which the word "children" is used in the will, but the question is as to the meaning of section 11 of the statute in regard to descents, which provides that the issue, if any there be of such devisee or legatee, shall take the estate devised whenever such devisee or legatee, being a child or grandchild, shall die before the testator and no provision shall be made for such contingency. No provision is made in the will in the case at bar for the contingency of the death of one of the legatees before the death of the testator. The four children of the testator were well known to him when he made his will, and are spoken of by him as his "beloved children." It does not appear that it was necessary to mention the four children by name, in order to indicate the persons who were to be the subjects of his bounty. Certainly, justice and equity would require that the children of the deceased child should take the same interest in the property, as the three children, living at the death of the father, would take.

In *Strong v. Smith*, 84 Mich. 567, the statute of Michigan there under consideration provided that, "when a devise or legacy shall be made to any child or other relative of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the

testator, such issue shall take the estate, so given by the will, in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will;" and it was there held that, under a will devising real estate in equal shares to the brothers and sisters of the testator, and to those of his wife, without naming them, the issue of the deceased brothers and sisters of the testator, who survived him, took the estate devised to their parents respectively, such a devise being governed by the Michigan statute above quoted. It will be observed that the Michigan statute is similar in terms to our own statute, and we see no reason why the doctrine announced in the case of *Strong v. Smith*, *supra*, should not be applied to the case at bar.

In *Strong v. Smith*, *supra*, the case of *Moses v. Allen*, 81 Me. 269, is referred to and commented upon, where it was held that it could make no difference, in the application of the rule, whether relatives were referred to by name, or described by their relationship to the testator.

In *Woolley v. Paxson*, 46 Ohio St. 307, in commenting upon the statute for the prevention of lapses, the court said: "The fact, that the child or relative is not mentioned by name, should not defeat the application of the statute where the language, applied to the facts as they were at the execution of the will, designates a child or relative as an object of the testator's bounty with as much certainty as if it were mentioned by name. \* \* \* They were all adults and their names well known to him; and the devise that he makes is to Isaac for life, and then to his children in fee simple. This, in the light of the circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee simple in remainder, as definitely as if it had been to each by name. \* \* \* Hence, as under a devise to a class, each member who survives the testator would, independent of the statute, take an aliquot part of the devise as

a tenant in common with the other survivors, therefore, under the statute, in such case the issue of a deceased member of the class surviving the testator must take what the deceased would have taken had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are by its terms directly applicable."

In *Strong v. Smith*, *supra*, it was further said: "The devisees, at the time of the execution of the will, were all known to the testator. They had matured. The 'class' was liable to diminution only. The fact that the brothers and sisters of the testator were not named does not take them out of the statute. Indeed, under the authorities, the question, 'whether a gift is one to a class does not depend upon the fact that the devisees are not named individually, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons.' Here, the body of persons was not uncertain in number. The gift was to a certain number in 'equal shares.'"

So, in the case at bar, the body of persons was not uncertain in number, because Frederick William Rudolph, at the time he made his will, had exactly four children, who were all well known to him at that time, and his gift is "to my beloved children as their absolute property in fee simple to be equally divided between them;" that is to say, the gift here, as in *Strong v. Smith*, *supra*, is to a certain number in equal shares. If the number of children had been uncertain at the time of the making of the will, and to be ascertained at a future time, so that the share of each would be dependent as to its amount upon the ultimate number of persons, a different case would be presented, but no such case is shown by the present record. (See also in support of

these views the following cases: *Stockbridge, Petitioner*, 145 Mass. 517; *Bradley's Estate*, 166 Pa. St. 300; *Cheney v. Selman*, 71 Ga. 384; *Yeates v. Gill*, 9 B. Mon. 203; *Moore v. Weaver*, 16 Gray, 305; *Guitar v. Gordon*, 17 Mo. 408; *Moore v. Dimond*, 5 R. I. 121.)

In *Missionary Society v. Pell*, 14 R. I. 456, the statute under consideration was as follows: "Whenever any child, grandchild, or other person, having a devise or bequest of real or personal estate, shall die before the testator, leaving a lineal descendant, such descendant shall take the estate, real or personal, as devisee or legatee, in the same way and manner as such devisee or legatee would have done in case he had survived the testator;" and it appearing there that the legatees died before the testator leaving lineal descendants, it was held that the will must be presumed to have been made in view of the statute, the court saying: "We think it must be presumed that the testator made the will in view of the statute, and that he intended to have the statute prevail unless the contrary appears. The burden of showing the contrary is on the plaintiff, and we do not think the burden is lifted when it is made to appear that the legacies were prompted by personal regard. The fact, that legacies are prompted by a personal regard for the legatees, is not at all inconsistent with an intent to have them go to the descendants of the legatees in case the legatees themselves die before the testator. The plaintiff must go further and make it appear that the legacies were not only prompted by personal regard, but that they were, as he claims, intended to be purely personal gifts, *i. e.*, that they were intended not to go to the descendants of the legatees under the statute." In the case at bar, it is said that the use of the words, "my beloved children," indicated that the legacies were prompted by a personal regard for those children, and, therefore, that it could not have been the intention of Frederick William Rudolph that the property should go to the issue of the

legatees. But we are of the opinion that, even if the words used in the will do indicate that the testator was prompted by personal regard for his children, that fact is not at all inconsistent with an intent to have the property go to the issue of the children, in case any of the devisees or legatees should die before the testator.

Inasmuch as the construction of said section 11, as applying to gifts to classes, as well as to gifts to individuals, conforms to the construction, given to similar statutes in a large majority of the States, and harmonizes with the great weight of authority upon the subject, we are inclined to hold such construction to be the correct one; and we are of the opinion that the children of Henry Rudolph, to-wit, Aurelia and Corinne Rudolph, are entitled to take the same interest in the estate as their father, Henry Rudolph, would have taken, if he had not died before his father died, notwithstanding the fact that Henry Rudolph was not referred to in the will by name, but only as one of the testator's children, and as belonging to the class designated as children. The adoption of this construction gives to Aurelia and Corinne Rudolph an undivided one-fourth interest in the property, or to each of them an undivided one-eighth interest in the property. As the decree of the court below gave them nothing, it is erroneous in that respect under the views above expressed. It is correct, however, in holding that neither the widow of Henry Rudolph, nor his divorced wife, is entitled to dower, as he was not seized of any portion of the premises during his marriage with either of them.

Accordingly, the decree of the circuit court of St. Clair county is reversed and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

AUGUST SEIDSCHLAG  
v.  
THE TOWN OF ANTIOCH.

*Opinion filed February 17, 1904.*

1. **APPEALS AND ERRORS**—*when action of the trial court must be presumed to be correct.* Denial of a motion to dismiss an appeal from a justice of the peace upon the ground that no complaint in writing was filed, will be presumed correct on appeal, where, although the complaint is not in the record, the clerk's certificate does not state that the record is complete, but that it contains all papers called for in the *præcipe*, which does not mention the complaint.

2. **HIGHWAYS**—*building a fence within a highway is an obstruction.* Building a fence within the limits of the highway is an obstruction, within the meaning of section 71 of the Roads and Bridges act, whether the fence is across the road or longitudinal therewith and within the same.

3. **SAME**—*notice unnecessary to authorize a recovery of penalty for obstructing road.* Notice to remove an obstruction is not essential to the right to recover the penalty provided in section 71 of the Roads and Bridges act for obstructing the road, but notice must be given before the per diem penalty for allowing the obstruction to remain can be recovered.

4. **SAME**—*when motion to direct verdict for defendant in road obstruction case is properly denied.* A motion to instruct the jury to find for defendant in a road obstruction case is properly overruled where it is not denied that defendant built the obstruction, and there is evidence tending to establish the existence of a highway by prescription as well as by dedication at that point.

5. **SAME**—*what is admissible as tending to show location of highway by prescription.* In establishing a highway by prescription, records of highway commissioners showing the lines of a road which was petitioned for, surveyed and staked out but not legally established, are admissible as tending to show the line of travel by the public, but are not conclusive nor record evidence of the actual location.

6. **SAME**—*evidence as to location of traveled route is properly limited to the place obstructed.* In an action for a penalty for obstructing an alleged highway, evidence as to the location of the traveled track, in establishing road by user, is properly limited to the place where the alleged obstruction was placed.

7. **SAME**—*law will imply intention to dedicate from acts denoting such intention.* The law will imply an intention to dedicate land for a public highway from any acts of the owner indicating an intention to so appropriate it, and if the apparent dedication is accepted by the public the dedication is complete.

8. SAME—*testimony as to intent will not prevail over inconsistent acts.* Testimony by the owner of the land as to his intention with respect to a dedication will not prevail against unequivocal acts and conduct inconsistent with the intention testified to, where the public, in using the land, relied upon such acts.

9. SAME—*public may rely upon acts of land owner as indicative of his intent.* If the conduct of a land owner is such as to lead an ordinarily discreet and thoughtful man to infer an intention to dedicate the land for a road, and the public rely upon such conduct and accept and use the land for a road, the dedication becomes complete and cannot be recalled by the owner.

10. SAME—*period of user is not material if there is an accepted dedication.* User for any definite period is not required where an intention to dedicate is clearly implied from the acts of the owner and the dedication was accepted by the public.

*Seidschlag v. Town of Antioch*, 109 Ill. App. 291, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Lake county; the Hon. C. H. DONNELLY, Judge, presiding.

R. W. COON, for appellant.

C. T. HEYDECKER, and CHARLES WHITNEY, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a suit brought before a justice of the peace in the name of the people of the town of Antioch, against appellant, under the provisions of section 74 of chapter 121, entitled "Roads," (2 Starr & Cur. Stat. 1896, p. 3585,) to recover the penalty of not less than three dollars and not more than ten dollars provided by section 71 to be forfeited for obstructing a public road by building a fence therein. Judgment for five dollars and costs was rendered against appellant. He appealed to the circuit court of Lake county, and from an adverse judgment in that court appealed to the Appellate Court, where the judgment was affirmed, and this further appeal is prosecuted.

The style of the plaintiff was changed to "The Town of Antioch" in the circuit court. The appellant there

moved to dismiss the suit for want of jurisdiction, but the motion was denied. The motion is preserved by a recital in the bill of exceptions, but the grounds thereof are not recited. Counsel for appellant says the action should have been commenced by a complaint in writing, and that the ground of the motion was that no such complaint was filed. The record does not contain a complaint. The certificate of the clerk does not, however, certify that the record is complete. The certificate is, that the transcript contains a copy of "all the papers filed in the cause as called for in the *præcipe* filed herein." A copy of the *præcipe* filed by counsel for appellant is incorporated in the record, from which it appears the clerk was not asked to make a complete copy of all the papers in the case, but only of certain specified papers, the complaint not being one of the papers so specified. We are to presume the trial court ruled correctly on the motion until the contrary is made to appear, and as the record is silent as to whether a complaint was filed or not, we must accept the decision of the trial court as being correct. As it is not shown a written complaint was not filed, the question whether a complaint of that character is necessary is not presented for decision.

Section 71 of the Road act provides for two penalties, viz., (1) a penalty of not less than three dollars nor more than ten dollars for obstructing a public road by felling trees, etc., or "encroaching upon the same with a fence;" (2) a penalty of not exceeding three dollars per day for each day an obstruction so unlawfully placed in the public road shall be allowed to remain there after the offender has been ordered by any one of the highway commissioners to remove the same. Building a fence within the limits of a public highway is an obstruction, within the meaning of said section 71, whether the fence is built across the road or longitudinal therewith and within the road. (*Boyd v. Town of Farm Ridge*, 103 Ill. 408.) One who has obstructed a public road in violation of the

provisions of said section 71 is not entitled to notice to remove the same, as a prerequisite to the right to sue for and recover the penalty of not less than three dollars nor more than ten dollars provided by the statute for that act. Liability to the penalty of not exceeding three dollars per day for each day such an obstruction is allowed to remain does not attach until a notice or order to remove the same has been given. The action here was for placing an obstruction in the road, and no notice or order to remove was essential to the right of recovery.

The court properly overruled the motion, presented by the appellant at the close of all the evidence, to instruct the jury to return a verdict in his favor. That the appellant built a fence at the place in question was not denied. His contention was, that the place was not within the limits of a public highway,—that no highway lawfully existed there. A great many witnesses were produced, and the testimony of a number of them tended to prove the existence of a public road there by continuous user by the public for a much longer period of time than is required to establish a public road by prescription. There was also testimony tending to show a dedication of the land for use as a road to the public by the appellant. There was contradictory testimony, but it was for the jury to determine as to the truth of the controversy.

It was not error to admit in evidence a portion of the records of the highway commissioners which showed the lines of a road which had been petitioned for, surveyed and ordered by the commissioners laid out in 1862. It was not claimed a public road had been legally established by the proceedings which had been taken by the highway commissioners, nor was the record introduced for that purpose. There was a controversy as to the actual *situs* of the highway as used in those early years. Testimony was produced tending to show that a road had been actually staked off and laid out on the route

described in the petition and order produced in evidence, and had been used by the public, and the description in the plat and survey and order tended to fix the exact location of the line of travel thereon. The court, at the request of the appellant, granted an instruction advising the jury clearly as to the purpose for which this evidence was admitted and limiting its competency and applicability, and further, that it must not be regarded as conclusive or record evidence of the actual *situs* of the road, but that the actual location of the traveled route should be determined from all the evidence.

The plat or diagram prepared by James Anderson, county surveyor, was properly received in evidence. He testified it correctly represented the location of the objects marked thereon and certain measurements made by him of distances. It was rendered admissible as part of the testimony of the witness. *Wahl v. Laubersheimer*, 174 Ill. 338; *Justen v. Schaaf*, 175 id. 45.

We think the court properly limited the evidence as to the location of the traveled track of the road to the point where the fence had encroached on the highway. If the travel had been continuous there, it was of no consequence that at some other points in the line of the road the travel had deflected, to some extent, from the thread of the road to avoid obstructions or for similar reasons.

The complaint the court refused to permit the appellant, in order to rebut an intent to dedicate, to testify as to his intent in moving his fence in 1882, is not well taken. The questions to which objections were sustained called for statements made by others,—merely hearsay; and the answers made by appellant which were stricken were statements of others made to him or of what he had learned from other persons. The court did not deprive him of the right to testify as to his intent.

We cannot determine whether a plat or diagram offered in evidence by the appellant, and rejected, should have been received, for the reason the instrument is not

preserved in the bill of exceptions. It, however, seems clear from the testimony of the maker of the plat, the details of the plat and much that appeared thereon had been obtained from others, and was not within the knowledge nor was it the result of the personal examination of the premises by the draftsman of the diagram.

We do not think the judgment should be reversed because of the ruling of the court in the matter of instructing the jury. The criticism of instruction No. 1 given for appellee is, it told the jury a dedication of lands to public use may be by acts or words; that no words of dedication were proven, and that "no acts not accompanied by words can show an intent to dedicate, except permitting the land to be used for a road, and such permission must continue for twenty years." The law will imply an intention to dedicate land to the public use from any acts of the owner which indicate an intention to so appropriate it, and if the apparent dedication is accepted by the public the dedication becomes complete. (Elliott on Roads and Streets, sec. 123.) Whether there was an intent to dedicate is to be determined upon consideration of the testimony of the land owner as to his intent, together with his acts and conduct. His testimony as to his intent will not prevail against unequivocal acts and conduct inconsistent with his intent as testified to, if the public relied and acted on his act. The public may rely on that which the land owner has done as indicative of his intent, and if his conduct has been such as to lead an ordinarily discreet and thoughtful man to infer an intention to make a dedication, and the public rely upon such acts as a dedication and accept the same for public use and use it as a public road, the dedication becomes complete and cannot be recalled by the owner. (*City of Chicago v. Chicago, Rock Island and Pacific Railway Co.* 152 Ill. 561; Elliott on Roads and Streets, secs. 123, 124.) When a dedication is to be clearly implied from the acts and conduct of the owner, the dedication becomes effectual

at once as soon as accepted by the public, and no definite time of user is requisite. Elliott on Roads and Streets, sec. 163; *City of Chicago v. Wright*, 69 Ill. 318; *Moffett v. South Park Comrs.* 138 id. 620; *Fairbury Union Agricultural Board v. Holly*, 169 id. 9.

Instruction No. 2 was designed to advise the jury of the different modes by which a public highway may be acquired, dedication by the owner being one of such modes. The complaint is, that there was no evidence of user of the road at the point in the road where the fence was built, for the length of time necessary to create a road by prescription, hence, in the view of counsel, it was error to advise the jury a public road might have been acquired by dedication. The objection to instruction No. 3 is, "that unless an intention to dedicate is manifested by writing or declarations, that possession by the public for twenty years or over is necessary to constitute a dedication." What has been said in answer to the criticisms upon instruction No. 1 disposes of the complaints as to instructions Nos. 2 and 3.

The objections that instructions Nos. 6 and 9 were given for appellee and instruction No. 8 refused for the appellant arise out of the same erroneous views of counsel that user for some definite period of time is necessary to complete the dedication of lands to public use as a public road.

The third instruction tendered by the appellant asked the court to instruct the jury that if the highway attempted to be laid out by the highway commissioners in 1862 was not opened within five years thereafter the proceedings ceased to have legal effect and that the ground "would revert to and become the property of the owner." The court modified the instruction to the effect that the failure to open the road within five years would render the proceedings by the highway commissioners null and void. If the public had acquired a road by dedication, the ground on which the road was located would not be-

come the property of the appellant, as the court was asked to charge the jury by the instruction as originally drawn. The instruction ignored the claim of a road by dedication and the proof in support thereof, and the modification was necessary, or at least highly proper, in order the jury might not be misled.

We think the record free from error of reversible character, and the judgment must therefore be, and it is, affirmed.

*Judgment affirmed.*

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THOMAS FIREBAUGH

v.

ISAAC DIVAN.

*Opinion filed February 17, 1904.*

**REAL PROPERTY**—*crops not severed from the soil pass by deed, though mature.* Crops not severed from the soil, although mature and ready to be gathered, pass to the grantee upon delivery of a deed containing no reservation of the crops to the grantor. (*Powell v. Rich*, 41 Ill. 466, explained and criticised.)

**APPEAL** from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding.

This is an action of assumpsit, begun in the circuit court of Champaign county by the appellant, against the appellee. The declaration contained one count, and alleged that on the 21st day of October, 1902, the plaintiff sold and delivered to the defendant a certain piece of real estate, and conveyed the same to him by warranty deed containing general covenants of warranty; that at the time of said sale the plaintiff had standing upon said land the corn that was grown thereon that year; that while said corn was still undetached from the soil, it

was, nevertheless, fully matured and ready for gathering and cribbing at the time of said sale; that said corn was not reserved or mentioned in said deed; that a few days after said deed was delivered plaintiff sought to remove the corn but was prevented from so doing by the defendant; that the defendant gathered the corn and converted the same to his own use, to the damage of the plaintiff of the sum of \$300. A general demurrer was filed to the declaration, which was sustained. The plaintiff elected to stand by his declaration, and judgment was rendered in favor of the defendant in bar of the action and for costs. The plaintiff prosecuted an appeal to the Appellate Court for the Third District, where the judgment was affirmed, and a certificate of importance having been granted by the Appellate Court, a further appeal has been prosecuted to this court.

JOHN J. REA, for appellant:

A conveyance of land, either by voluntary deed or judicial sale, without reservation, carries all growing crops with the title to the land. This rule only applies to crops which are immature and have not ceased to draw nutriment from the soil at the time of the sale, and is not applicable to crops that are ripe and ready for harvest. This distinction has been carefully recognized in all the cases where the subject was considered. *Bank v. Beegle*, 52 Kan. 709; *Garanflo v. Cooley*, 33 id. 137; *Beckman v. Sikes*, 35 id. 120; *Caldwell v. Alsop*, 48 id. 571; *Goodwin v. Smith*, 49 id. 351.

Crops ripe for the harvest are personal property. They pass to the executor, and not to the heir. They are liable to be seized on execution, and the officer may enter, cut down, seize and sell the same as other personal estate. *Penhallow v. Dwight*, 7 Mass. 34; *Heard v. Fairbanks*, 5 Metc. 111; *Mulligan v. Newton*, 16 Gray, 212; *Cheshire Bank v. Jewett*, 119 Mass. 241; *Sherman v. Willett*, 42 N. Y. 146; *Shepard v. Philbrick*, 2 Denio, 174; *Shannon v.*

*Jones*, 12 Ired. L. 208; *Brittain v. McKay*, 1 id. 268; *Stewart v. Doughty*, 9 Johns. 108; *Bradner v. Faulkner*, 34 N. Y. 347.

A conveyance of realty carries the annual crops, but crops that are ripe and ready for harvest will not, being unmentioned in the deed, pass thereby as realty. *Washburn on Real Prop.* sec. 11, p. 11.

F. M. GREEN & SON, for appellee:

Matured crops, if severed from the soil, become personalty, and do not pass by a deed; but crops not severed, whether ripe or unripe, pass to the vendee by the deed, as being annexed to and forming a part of the freehold. *Damery v. Ferguson*, 48 Ill. App. 224; 4 Kent's Com. 468; 2 Blackstone's Com. 122, note 3; *Killredge v. Woods*, 3 N. H. 503; *Broom's Legal Maxims*, 354; *Tripp v. Hasceig*, 20 Mich. 254; *Heavilon v. Heavilon*, 29 Ind. 509.

The general rule of the common law is, that growing crops form a part of the real estate to which they are attached and from which they draw nourishment, and unless there has been a constructive severance of them from the land they follow the title thereto. 8 Am. & Eng. Ency. of Law, (2d ed.) 303.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

The law in this State is well settled that, as between vendor and vendee, growing crops produced by annual planting and cultivation are real estate, and pass to the vendee unless they are reserved in the deed or by other writing executed simultaneously with the deed. This is conceded by the appellant to be the general rule, but it is contended where the crops are fully matured at the time of the execution of the deed and are ready to be severed from the soil they do not pass to the vendee, but that the title thereto remains in the vendor, and he may afterwards enter upon the land and remove the same, and if they are gathered by the vendee and converted to

his use he is liable to the vendor for their value. We do not agree with such contention, but are of the opinion, upon principle and authority, that there is no distinction in this particular between crops, whether mature or immature, standing upon the land at the time of the conveyance. A deed, when delivered, transfers to the grantee all the interest of the grantor in the land not reserved and entitles the grantee to possession. The title to the crops then standing upon the land, not severed from the soil, whether ripe or unripe, passes to the vendee as a part of the land. By the delivery of the deed the vendor loses all dominion over the land. In *Tripp v. Hasceig*, 20 Mich. 254, (a well considered case,) it was held that ripe crops, although no longer drawing nutriment from the ground, will, if still unsevered, pass by a conveyance of the land. In 4 Kent's Commentaries, on page 468, it is said: "If the land be sold without any reservation of the crops in the ground, the law is strict as between vendor and vendee; and I apprehend the weight of authority to be in favor of the existence of the rule that the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing, or anything else, and that it leaves exceptions to the rule to rest upon reservations to be made by the vendor."

While cases may be found holding to the contrary, we feel convinced the rule above stated is the true doctrine. It is said the contrary rule is announced in *Powell v. Rich*, 41 Ill. 466. The court, in that case, held the crops, which at the time of the conveyance were immature, passed to the grantee, and the question here presented was not then before the court. What was there said in regard to the rule when the crops have matured was unnecessary to be said, and is not considered by us as an authority in support of the contention of the appellant.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

JACOB ELLIS

v.

THE CONRAD SEIPP BREWING COMPANY *et al.**Opinion filed February 17, 1904.*

1. DEBTOR AND CREDITOR—*creditor must protect the security held for the debt.* It is the right and duty of a creditor to diligently guard and protect the effects in his hands held as security for the debt.

2. CONTRACTS—*when contract is not an absolute release of liability.* A written contract which provides for a conditional release of liability will not be held an absolute release, where it is not shown the contract contained any mistake or was obtained by fraud.

*Ellis v. Conrad Seipp Brewing Co.* 107 Ill. App. 139, affirmed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This is a bill for an accounting and relief, filed in the superior court of Cook county by the plaintiff in error, Jacob Ellis, against the defendants in error, Jacob Wolfe and the Conrad Seipp Brewing Company.

On July 6, 1891, Ellis became indebted to the brewing company in the sum of \$1000, secured by trust deed to Theodore Oehne, trustee, conveying his homestead in the city of Chicago, at a place known as Roseland. Ellis had a brother who was also indebted to said brewing company in the sum of \$800, and on October 6, 1891, Ellis gave his note to secure this indebtedness. Upon these two notes \$400 was paid, leaving \$1400 balance due. On October 4, 1892, Ellis and Wolfe leased certain vacant lots on Cottage Grove avenue, in Chicago, for a term of fifteen years, and erected thereon a building, consisting of five store rooms on the ground floor and a hotel on the second floor. This building cost \$14,500, and \$5000 of that amount was borrowed from the brewing company, to be re-paid in five annual installments of \$1000 each, three of which were paid as they became due, leaving

\$2000 unpaid. This last piece of property is known in this record as the "Burnside property." On December 17, 1896, the brewing company obtained judgment against Ellis for the sum of \$2043, being the balance due on the \$1400 individual notes of Ellis, and an execution was levied upon the undivided one-half interest of Ellis in the Burnside property. This levy resulted in a conference between Ellis, Wolfe and the brewing company, in which a settlement was agreed upon. Two written agreements were there signed. One was between Ellis and Wolfe, which provided that in consideration of Ellis having conveyed to Wolfe all of his interest in the Burnside property, Wolfe was to assume all indebtedness due upon said property, and Wolfe was also to assume, as soon as said building could be sold by him, and not before, the judgment obtained by the brewing company against Ellis for \$2043, and Wolfe was also to assume the payment of the \$2000 which Wolfe and Ellis owed to the brewing company. The other agreement was between Wolfe, Ellis and the brewing company, and provided that in consideration of Wolfe having on that date delivered to the brewing company his note for \$3596.25, secured by a chattel mortgage executed by him, also partly secured by the trust deed from Ellis and wife to the brewing company on their homestead, and also further secured by the judgment of said brewing company against Ellis for \$2043, the brewing company, upon the payment by Wolfe of said note for \$3596.25, was to release to Wolfe and Ellis each of said securities, and if, prior to the payment of said note for \$3596.25 by Wolfe, Ellis should pay said brewing company the amount due it upon the trust deed executed by Ellis upon his home place, then the brewing company was to release to Ellis his homestead, and credit upon the note of \$3596.25 the amount of the payment as made by Ellis. Ellis claims that it was his understanding that these contracts entirely liquidated his indebtedness to the brewing company, and that he made several

requests for the return of his papers, but did not succeed in getting them. About six weeks after the contracts were executed Wolfe failed to pay the ground rent and taxes on the Burnside property and the same were paid by the brewing company at Wolfe's request, and on May 7, 1897, Wolfe executed his note to the brewing company for \$675 to secure this payment, and also assigned the rents of the Burnside premises to the brewing company. Upon this note of \$675 and the note of \$3596.25 default was made in payment, and on August 24, 1897, judgment was entered for \$4472.96. In April, 1899, Ellis' homestead in Roseland was destroyed by fire, and the loss adjusted at \$1407. Before the money was paid to Ellis the brewing company garnisheed the insurance companies upon the above judgment, and Ellis filed this his bill for relief.

The bill alleges the facts as above set forth, prays for an accounting, and that Wolfe be ordered to pay whatever is found due, and that upon his failure so to do, the brewing company be required to foreclose its trust deed upon the Burnside property, and if enough is not realized from said foreclosure, complainant offers to pay the balance. A decree was rendered upon the hearing, adjusting the rights of the respective parties, from which decree an appeal was taken to the Appellate Court for the First District, where the decree was affirmed, and by this writ of error the cause has been brought to this court.

SAMUEL J. HOWE, for plaintiff in error.

WINSTON, PAYNE & STRAWN, for defendants in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The decree is quite lengthy and finds the facts as above set forth. There are but three points raised in this court, and only such parts of the decree as involve these questions need be considered.

It is first insisted by plaintiff in error that by the contract entered into between Ellis, Wolfe and the brewing

company Ellis was to be released of liability and Wolfe was to be responsible for the debt. In support of this contention plaintiff in error offered oral testimony as to certain conversations which took place prior to the making of the contracts, but the record shows that all of these conversations were merged into the two written agreements. The evidence does not show that these written agreements contained any mistake or were obtained by fraud. They are therefore binding upon the plaintiff in error, and the contracts, upon their face, do not sustain the contention in that regard.

The decree found that to the extent of \$1830.36, with interest, Ellis was indebted to the brewing company as surety for Wolfe, and that the net amount of rents collected by the brewing company was \$391.03, and that this should be applied in paying the note of \$675 made by Wolfe. This part of the decree, it is insisted, is an attempt to hold Ellis' property to cover future advances made by the brewing company to Wolfe, and that to the extent of at least one-half of the net rents collected on the Burnside property Ellis was entitled to credit on the debt for which he was found to be security for Wolfe. We do not think this contention is sustained by either the law or the evidence. The contract released Ellis only upon certain conditions. Before these conditions were complied with, Wolfe defaulted in the payment of the ground rent and taxes to the extent of \$675. A part of this default was before the contracts were made. If this sum was not paid the whole property would be forfeited and lost to all parties. Wolfe had no money to make the payment, and to prevent the loss the brewing company made the payment and Wolfe assigned the rents as surety. It is the duty of a creditor to diligently guard and protect effects in his hands for the security of his debt, and the application by the brewing company of the rents towards the discharge of the note given for back ground-rent and taxes was a proper and lawful action

on the part of the creditor to protect the surety held by it, and of this provision in the decree plaintiff in error had no ground to complain.

The decree further provides that if, upon the foreclosure sale ordered to be made, enough was not realized to pay the sum of \$4495.20, with interest at five per cent, then Ellis' insurance money, or so much of it as should be necessary to cover the deficit, should be applied to that purpose. It is insisted that this part of the decree is wrong, for the reason that the judgment which was rendered against Wolfe on the note he gave at the time Ellis made the conveyance to him, included \$100 attorney's fees, and it was manifestly improper to hold that Ellis should be charged with the payment of attorney's fees incurred in entering judgment against Wolfe on his personal note for \$675. An examination of the assignment of error shows that this point was not made in the Appellate Court and is raised in this court for the first time, and there is no assignment of error in this court upon which it can be based. We have, however, examined the decree in this respect, and find that the total amount due on said judgment, including attorney's fees, was found to be \$5810.96, of which \$4495.20 was due on account of the note representing the joint liability of Wolfe and Ellis, and the balance was due upon the note representing Wolfe's individual indebtedness. It does not appear how the attorney's fee of \$100 was charged on these notes. For anything appearing in the record, the fee may have been included in the \$815.76 found to be the amount due upon Wolfe's individual note. But even if the \$100 is charged as plaintiff in error claims, Ellis was clearly liable therefor, the note which he gave providing for an attorney's fee of \$100 in case of judgment being entered thereon. For these reasons we find no error in the decree in this respect.

The decree of the superior court and of the Appellate Court will therefore be affirmed.

*Decree affirmed.*

A. MAYER

v.

WILLIAM GERSBACHER *et al.* Admrs.

*Opinion filed February 17, 1904.*

1. BAILMENTS—*when miller is not liable for loss of grain by fire.* A miller who mixes grain under an agreement with the owner that he will keep an equal quantity on hand, of the same grade, subject to the owner's order, is not liable for loss by fire if he keeps his agreement and uses proper care for the safety of the grain and the prevention of fire.

2. SAME—*when time of the agreement is not material.* Whether the agreement permitting a miller to mix grain was made at the time the grain was received or at a later period is not material, if the grain was intact at the time of such agreement.

3. SAME—*bailee without reward is held to reasonable diligence, only.* A miller who receives grain for safe keeping to accommodate the owner and without reward, is only held to the use of ordinary care and diligence in caring for the grain.

*Mayer v. Gersbacher*, 106 Ill. App. 511, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of White county; the Hon. E. E. NEWLIN, Judge, presiding.

GEORGE B. PARSONS, and JESSE E. BARTLEY, for appellant.

PARISH & PARISH, and C. S. CONGER, for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Fourth District affirming a judgment of the circuit court of White county in favor of John W. Springer, appellees' intestate, in a suit brought by appellant to recover for certain wheat deposited in defendant's mill, and which, with the mill, had been destroyed by fire. The case has been twice tried in the said circuit court and judgments entered in favor of defendant, and,

on appeal, each time affirmed by the Appellate Court. The first appeal to the Appellate Court is reported in 95 Ill. App. 173. An appeal from the decision therein rendered was taken to the Supreme Court, and the decision there obtained is reported in 192 Ill. 270, to which reference is made for a more extended statement of the pleadings. On said appeal to the Supreme Court the judgments of the lower courts were reversed on the ground of an erroneous instruction.

The evidence shows that there was deposited in intestate's mill, in 1898, 3247 bushels and twenty-two pounds of wheat belonging to appellant, and the following receipts were taken:

"SHAWNEETOWN, Aug. 19, 1898.

"Received from A. Mayer 2142 bushels and 25 pounds of No. 2 red wheat, to be held in storage for him (A. Mayer) in the Riverside mills.

J. W. SPRINGER & Co.,  
By J. M. WHITE."

"SHAWNEETOWN, Sept. 24, 1898.

"Received from Mr. A. Mayer the following lots of wheat: 798 $\frac{1}{2}$  bushels of wheat, testing 56 pounds; 1644 $\frac{1}{2}$  bushels of wheat, testing 55 $\frac{1}{2}$  pounds; 151 bushels of wheat, testing 50 $\frac{1}{2}$  pounds.

J. W. SPRINGER & Co."

It seems to be agreed that by the terms of the contract of storage appellant was to pay nothing for storing the wheat, and appellees' intestate was to have the option of purchasing the wheat when appellant concluded to sell, provided said intestate would pay as much as any one else.

In July, 1899, appellant made a further deposit of 498 bushels and twelve pounds, making in all 3745 bushels and forty-four pounds. Of this amount appellant sold to appellees' intestate, in January, 1899, 1000 bushels, and in July, 1899, 380 bushels, all of which was paid for and is not in controversy here. There was left a balance of 2365 bushels and forty-four pounds, the subject of this litigation. For the deposit in 1899 no receipt was taken, and as to the terms on which it was received, M. W. Car-

ter, assistant manager of defendant's mill, testified that when the wheat was brought in he told one Karcher, who had charge of it, that the mill was full and there was no place to put it, but that as the wheat was dry they could mix it with other wheat and use it in that way, but they had no place to store it unless they emptied out the sacks, and it was there agreed that they were to use and grind the wheat if they wanted to, Karcher stating, "We don't care anything about the wheat; we never expect to move the wheat out of here, but if we do, we only want just as good as we put in."

The testimony on the part of defendant was to the effect that about the first of December, 1898, the weevil got into the wheat, and when appellant was so informed, it was agreed that defendant, appellees' intestate, should re-clean and grind the wheat, making such disposition of it as he saw fit, and keep on hand, for appellant, an amount of like quantity and quality. On the part of appellees' intestate it is claimed, that he in all respects carried out this agreement, and at all times, up to the time the mill was burned, kept on hand sufficient wheat of the same grade as appellant's, and subject to his order, to re-place the wheat deposited. This alleged agreement, and the contention of the appellees' intestate as to his compliance therewith, were denied by appellant, and formed the main question in dispute upon the trial.

In addition to the plea of general issue, filed to the declaration at the first trial, defendant, on the present trial, filed notice of his defense, in writing, as follows: "The plaintiff will take notice that on the trial of this cause the defendant will give in evidence, and insist, that previous to the time when the said mill and the wheat of said plaintiff was destroyed by fire, an agreement had been entered into by and between said plaintiff and said defendant by which said defendant was authorized to mix the said wheat of plaintiff with that of said defendant, and to grind up and dispose of the said wheat

of said plaintiff as said defendant might desire, and to keep in store for said plaintiff an equal amount of wheat of the same grade as the wheat of plaintiff, subject to the plaintiff's order and demand, and that in pursuance of said agreement said defendant did grind up and dispose of the wheat of said plaintiff, and in lieu and place thereof the said defendant did keep in store in his said mill an equal amount of wheat to that received by defendant from said plaintiff, and of the same grade, at all times subject to the demand of said plaintiff from and during and at all times after the said wheat of plaintiff was received by defendant in his said mill up to the time the said mill and its contents were destroyed by fire, and that such quantity of wheat was actually in said mill at the time the said mill was so destroyed by fire and was burned up and destroyed by fire; that said defendant at all times used proper care for the safety of said wheat and the prevention of the fire which destroyed the said mill and wheat."

The errors assigned are the giving of instructions for defendant and the refusal and modification of instructions for plaintiff. The instructions for defendant are all objected to. They are eight in number and cover several pages, and we deem it unnecessary to set them out in full, for, while minor inaccuracies may be imputed to them, they contained no such error as would necessitate a reversal of this case. Counsel for appellees insist that all of their instructions were framed with direct reference to the language of this court on the former appeal of this case, and based upon the evidence. The language of the court referred to is: "If there was an agreement by which defendant [Springer] was authorized to mix the wheat with his own grain or grind and dispose of it, and to keep in store for the plaintiff [Mayer] an equal amount of wheat of the same grade, the question would be whether he complied with his agreement and kept in store the requisite amount of the same grade, and

whether he used proper care for its safety and prevention of fire."

Appellant's objections to the first of said instructions are, that "there is no evidence to support the proposition that there was an agreement for the defendant to keep in store for appellant other wheat;" and "the instruction is misleading for the further reason that it does not fix the time of the agreement and limit the time of keeping other wheat in store for appellant to the time subsequent to the agreement."

J. M. Springer testified in behalf of appellees, that in the summer of 1898 he was running the Riverside mill, belonging to J. W. Springer & Co.; that he was overseer and manager; that he remembered about appellant putting wheat in the mill in 1898, and that about the first of December weevil got into this wheat; that he notified appellant of the weevil and that he would have to do something, as the weevil would ruin the mill, and that he would have to re-clean it or do something with it; "he asked me if we could re-clean the wheat in the mill, or ship it, or do something with it, and I told him I did not know, but we probably could re-clean part of it; Mayer said, 'Go ahead and re-clean the wheat and grind it, or do whatever you want to with it; I have no room to clean it, and whatever you do is all right with me; wheat is wheat, and all I want is as good wheat as I put in there, if I don't sell it.'" Witness further testified that on January 21, after the weevil got into the wheat, he bought 1000 bushels of this wheat from Mayer, and on July 22 bought 380 bushels more. He further testified that on the night of the fire there was enough wheat in the bins to answer all deposits, of as good grade as that deposited by Mayer and some of it better, and that he bought wheat of other parties for grinding, as they did not want to grind their deposit wheat. "I was at the mill when the first wheat was put in there by Mayer, in 1898; up to the time the weevil got into it the wheat was kept distinct

from the other wheat and had not been mixed with other wheat." As to the wheat deposited by appellant in 1899, this witness stated that he directed Mr. Carter to make the contract.

John W. Springer, appellees' intestate, testified that his brother, Jim Springer, and one White, were in charge of the mill in 1898 and 1899, and in a conversation with appellant after the fire, in regard to a settlement between them as to the lost wheat, he asked appellant, "Didn't you give my brother Jim permission to re-store it or re-clean the wheat or ship it?" and in reply "he said he had told Jim to do that; 'take the wheat and re-clean it, as I can't do that;' said he had been a good friend to him and wanted him to help him along; is about his language as well as I remember it now."

M. W. Carter testified, in behalf of appellees, that in 1898 and 1899 he was employed at the Riverside mill as assistant manager and book-keeper; that he was there in 1899 when the Mayer wheat was brought in; that it was not received under any agreement when brought in, and after some conversation had about not receiving the wheat because the mill was full, said: "This wheat is dry and all right, and we have got wheat that we can mix with it and grind it, and if you will let us do so we can use it that way, but we have got no place to store it at all unless we empty it out of the sacks; and the agreement between Mr. Karcher [the man in charge of the wheat] and I was, that we were to use the wheat and grind it if we wanted to. He said, 'We don't care anything about the wheat; we never expect to move the wheat out of here, but if we do, we only want wheat just as good as we put in.'" Witness further testified, in response to the inquiry of whether there was kept on hand at all times, while he was at the mill, sufficient wheat to meet the demands of depositors, "Yes, at all times, of the same grade and quality that Mayer had in the mill." This was objected to unless the witness knew the grade

of the Mayer wheat of 1898. Witness then stated that he did test the wheat brought in 1899, himself, and that brought in in 1898 was pointed out to him when he first went in the mill, by Jim Springer. The latter part of this answer was also objected to and objection sustained.

Under the above evidence we think appellant's objection to the instruction, for the reasons stated, cannot be sustained.

The second instruction was as follows:

"The court instructs the jury that if you believe, from a preponderance of the evidence, that there was an agreement entered into between the plaintiff and defendant, or their authorized agents, in reference to the mixing or grinding up of plaintiff's wheat, then it makes no difference whether such agreement was made at the time the wheat was deposited in the mill or at any time after that and prior to the fire."

Appellant's objection to this instruction is, that it leaves out of consideration the fact that there might have been a conversion of the wheat before the making of the alleged agreement. The fact of such agreement was the main issue, and, notwithstanding plaintiff's denial, the jury must have given credence to the defendant's contention. There was evidence tending to show that until the question about the weevil in appellant's wheat arose the deposit was preserved intact, and when that question arose the evidence indicates, at least, that there was a new arrangement between the parties. At least we think there was evidence tending to support such a conclusion. It is true, concerning this arrangement there was a direct conflict in the evidence, but the finding of the jury was favorable to appellees. The instruction is, in a sense, open to the criticism appellant suggests, yet we do not think he was injured by the inaccuracy referred to, for unless the jury accepted defendant's whole version of the matter, which was, that until the question about the weevil arose the deposit remained

intact and then a new arrangement was effected, we do not think it at all probable they could have found in favor of defendant, and if the jury did take such view, the inaccuracy of the instruction did not injure appellant.

The third instruction was:

"The court instructs the jury, if you believe, from the evidence, that the plaintiff stored wheat in defendant's mill for safe keeping, then defendant is bound only to use ordinary care in keeping and caring for said wheat."

Of this instruction appellant says, that although it announces a correct principle of law upon the issue as to whether or not the defendant is liable for the loss of the wheat if occasioned by the destruction of the mill by fire, yet it is calculated to mislead the jury on the other issues involved in the case, in that it does not limit the degree of care to that issue; that under this instruction a jury might infer that if defendant used only ordinary care in keeping the wheat or in caring for it so as to prevent its being mixed with wheat of defendant, he would not be liable, even though the manager of defendant may have, without authority from plaintiff, mixed it with other wheat. There is evidence to sustain the conclusion that the appellees' intestate was but a bailee without reward, and in such case he was only held to reasonable diligence in caring for the wheat, and the instruction accurately stated the law.

The fifth instruction was:

"The court instructs the jury that in determining the question as to whether or not the defendant had in his mill a sufficient quantity of wheat of like grade and character as that deposited by the plaintiff, you should take into consideration all the facts and circumstances proven in the case."

Appellant's counsel say this instruction was erroneous because it singled out a fact immaterial in itself and directed the jury's attention to it; that in the absence of an agreement that the defendant might use the

wheat of plaintiff and keep in store for him other wheat of like grade, it was immaterial whether defendant had other wheat of like grade or not; that this instruction might cause the jury to infer that the only issue involved was, did defendant have other wheat, and thus divert their attention from other material issues. Other instructions presented to the jury the material issues, and we do not think they were obscured by the giving of this instruction.

The sixth instruction was as follows:

"The jury are instructed that if you believe, from a preponderance of the evidence, that the plaintiff deposited the wheat with the defendant in his mill, and that the defendant was to have the right to return to the plaintiff the number of bushels of wheat so deposited, of like grade, at any time the plaintiff so desired, and that at the time the mill burned the defendant had in his mill the amount of wheat of like grade ready to be delivered to the plaintiff, and that the defendant used ordinary care to prevent fire or destruction of the wheat, then, in such case, the plaintiff cannot recover."

Under the evidence we cannot see that appellant was harmed by this instruction. There is no evidence that plaintiff desired or demanded the return of any wheat prior to the burning of the mill, and if at that time the defendant had on hand, subject to plaintiff's order, the required wheat, then, under such an agreement as the instruction requires the jury to first find in order to exempt the defendant from liability, the appellant has no cause for complaint.

The eighth instruction given for defendant was:

"The court instructs the jury, that if you believe, from a preponderance of the evidence, that there was an agreement by which the defendant was authorized to mix the wheat of plaintiff with his own grain, or grind it and dispose of it, and to keep in store for plaintiff an equal amount of wheat of the same grade, to be delivered

to plaintiff at any time upon demand, then, if you further believe, from the preponderance of the evidence, that the defendant complied with his agreement and kept in store, and had in the mill at the time of the fire, the requisite amount of wheat of the same grade of that delivered by plaintiff, and that he used proper care for the safety of the wheat and the prevention of fire, the defendant would not be liable for its loss, and the jury should find the issues for the defendant."

Appellant contends that this instruction is erroneous because not stating the law applicable to the case as determined by the agreement pleaded in the notice of special matter, nor as determined by the subsequent agreement attempted to be proven by the evidence. We think there was evidence upon which this instruction might properly be based. Appellant contends that there was nothing in the language of the alleged agreement, as testified to by witnesses for defendant, to the effect that any wheat was to be kept in the mill subject to appellant's order. We are of the opinion, however, that such an inference might fairly be drawn from the words, "All I want is as good wheat as I put in there, if I don't sell it to you," and, "We don't care anything about the wheat; we never expect to move the wheat out of here, but if we do, we only want wheat just as good as we put in."

Complaint is made of the modification and refusal of certain instructions offered by appellant. Appellant's third, fifth and seventh instructions, as offered, were modified and given, and his ninth, tenth and eleventh instructions were refused.

There was no error in the modification of appellant's third instruction. As given it conformed to the rule as stated by this court on the former appeal.

The fifth instruction, as modified, told the jury that it was the duty of one who receives grain in storage to use reasonable diligence to keep such grain in the con-

dition in which it was received, and if he mixes such grain with his own grain or with that of another, or uses the same, without the consent of the depositor, such act amounts to a conversion of the grain. The instruction, as offered, made the duty absolute, and the modification was the insertion of the expression to use reasonable diligence to keep, etc. It is complained that this instruction, as modified, told the jury that the bailee need only use reasonable diligence to prevent the grain being mixed with other grain or from being converted to the bailee's own use. We do not think the language of the instruction, or the purport of it, would bear such interpretation. The first portion of the instruction tells the jury that as bailee he should use reasonable diligence to care for it, and that he would be liable if he mixed it or converted it without the consent of the owner.

The seventh instruction, as modified, was, that if it was agreed between the plaintiff and defendant that the defendant might mix the wheat of plaintiff with other wheat, or use the same, and keep on hand other wheat of like quality and amount, subject to the order of the plaintiff, the jury could not find for the defendant unless they further believed, from the evidence, that the defendant did keep stored in his mill wheat of a like amount and quality to meet the demands of the plaintiff, and that if the jury believed, from a preponderance of the evidence, that defendant converted the wheat to his own use and did not keep in store, and have at the time the mill was burned, wheat in equal amount and quality subject to the order of the plaintiff, the verdict should be in favor of the plaintiff. It is contended by appellant that as defendant gave notice that he would rely upon the defense of authority to mix the wheat and pay in other wheat in like quality and amount and that he was always ready to perform that agreement, the burden, under this notice, was cast upon the defendant to establish this defense, but the instruction in question cast the burden

upon appellant. We are unable to see how the instruction attempted to place the burden upon either of the parties. It simply told the jury, if they found, from a preponderance of the evidence, the matters stated in the instruction, they should find for the plaintiff, but did not tell the jury who should make the preponderance; nor did the instruction, as originally offered, tell the jury that the burden rested upon the defendant upon this issue. Appellant's fourth instruction told the jury expressly that the burden upon the issue of a new contract, made after the wheat was stored, by which appellees' intestate might mix the wheat with his own, or grind it and re-place it with other wheat, was upon defendant. We do not think the instruction misleading as modified.

The ninth refused instruction offered by appellant was, in substance, that even if the jury believed, from a preponderance of the evidence, that the plaintiff agreed with the defendant that he could clean the wheat and grind it, and that in pursuance thereof the wheat was ground and shipped out by the appellees' intestate, then such transaction amounted to a sale, and the defendant was liable for the value of the wheat. This instruction was properly refused. There was no evidence tending to support it. It wholly ignores the evidence forming part of the statement of appellant or his agent which authorized the grinding of the wheat, that all appellant wanted was wheat as good as that put in there.

The tenth refused instruction was purely an abstract proposition of law. While we do not think it was error to refuse it, as we regard it as inherently bad, we would not reverse the case if it were good, as it was not applied to the case.

The appellant's eleventh refused instruction stated a proposition of law applicable to the case, and, so far as we can see, stated it correctly, yet we do not regard it as error to refuse it, because the same proposition is contained in appellant's seventh instruction as given.

Appellant's main contention seems to have been that there was not sufficient evidence to sustain the verdict or on which to predicate the instructions already discussed. It is not our province now to consider the weight of the evidence, but only to look into the record far enough to ascertain whether the evidence is of a character to support the judgment and verdict and on which to predicate the instruction, and having arrived at the conclusion that there is, we are bound to affirm the judgment of the Appellate Court, which is done.

*Judgment affirmed.*

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CLARENCE A. CHAMPION

v.

SMITH MYERS *et al.*

*Opinion filed February 17, 1904.*

1. **DIVORCE**—*when recital of decree must prevail.* A specific recital in a divorce decree that the defendant had been guilty of adultery must prevail on writ of error, where the certificate of evidence does not purport to contain all evidence on which the court acted.

2. **SAME**—*when wife may be given title to real estate in lieu of alimony.* A court of equity may assign to the wife, as alimony, part of the husband's real estate in fee where special equities exist, as that her earnings went toward the purchase of the property.

**WRIT OF ERROR** to the Circuit Court of Carroll county; the Hon. JAMES SHAW, Judge, presiding.

GEORGE L. HOFFMAN, and HENRY MACKAY, for plaintiff in error.

RALPH E. EATON, and C. W. MIDDLEKAUFF, for defendants in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is a writ of error brought to reverse the decree entered in the circuit court of Carroll county awarding Marianna, the wife of the plaintiff in error, a divorce, and

granting to her, as alimony, the fee title to two town or city lots in the town (now city) of Lanark, and also the title to the household and kitchen furniture in use in the dwelling house situate on one of said lots. Subsequent to the rendition of the decree for divorce the wife intermarried with the defendant in error Smith Myers, and on the 17th day of July, 1903, departed this life, leaving as her heirs and legal representatives the defendants in error. This writ was sued out on the second day of October, 1903.

The bill charged the plaintiff in error with adultery with one Minnie Reed. The plaintiff in error was personally served with summons but did not appear, and default was entered against him. The court heard the testimony of witnesses taken orally in open court, and a decree was entered which recites that the court found, from the evidence heard, that all of the allegations of the bill were true, and the decree also recited, as a special finding of fact, that the plaintiff in error was guilty of the charge of adultery.

There is a certificate of evidence in the record, but the certificate does not state that that certified to was all the oral evidence that was heard. The specific finding recited in the decree that the plaintiff in error was guilty of adultery must prevail, in the absence of the preservation of all the evidence upon which the court acted. (*Bowman v. Bowman*, 64 Ill. 75.) Moreover, we have examined the testimony as preserved by the certificate and think it amply supports the finding of the court.

The decree also recited that the court found, from the testimony, that the plaintiff in error owned three lots, namely, lots 2, 7 and 8, in block 5, Carry's second addition to Lanark, in Carroll county, on each of which lots was a dwelling house, and that the plaintiff in error was also the owner of household effects and "of cash of large value," and that the wife had no means of support, was

in delicate health and wholly dependent. The decree awarded to the wife the household furniture and the title in fee simple to two of said lots, namely, lots 2 and 8, in lieu of and as alimony, and declared the plaintiff in error to be the owner of the other lot. These three lots, with the houses thereon, were of the value of \$800 to \$1000 each. The principal contention is, that the decree should be reversed in so far as it invested the wife with the fee of the two lots.

The right and power of a court of equity to assign as alimony to the wife a part of the real estate of the husband in fee has been frequently declared by this court. (*Armstrong v. Armstrong*, 35 Ill. 109; *Ross v. Ross*, 78 id. 402; *Dinet v. Eigenmann*, 80 id. 274; *Robbins v. Robbins*, 101 id. 416; *Wilson v. Wilson*, 102 id. 297.) If the wife has no other claim than that which arises from the existence of the marriage relation, an allowance payable in money at stated periods, which remains within the control of the court to increase or diminish, is the proper mode of granting alimony, to which may be added absolute transfer of articles of personal property, as household furniture, when such is shown to be proper and advisable and peculiar conditions of the parties and of the property of the husband may render it best and proper that a money allowance in gross should be made. If the wife has, from equitable considerations, other and additional interests in her husband's property than such as attach to her status as a wife,—as, if her money came to the hands of the husband and has been invested by him in real estate to which he holds the title, or if her earnings or savings have gone into his possession and aided him in acquiring the real estate,—the court may properly, when dissolving the marriage relation, decree that the wife shall be vested with the title in fee to such real estate or some other real estate belonging to the husband, in order to effect an equitable and fair adjustment of the property rights of the parties.

We think the evidence as preserved in the certificate disclosed special equities in favor of the wife in the case at bar. We find from the transcript of the oral testimony that it advised the court as to the condition and necessities of the parties and to what extent the wife had contributed to the accumulation of property and the support of the family, which consisted of herself and her husband. It appeared from this testimony the parties were married in 1882 and lived together for seventeen years; that the husband became infatuated with a Mrs. Reed, made many trips from home with her and was much of the time in her company, and practically abandoned his wife. He was a carpenter, and his wife, for a number of years after their marriage, was employed as a clerk and for a further period of time worked for his mother. The husband received her earnings. While testifying she was asked, "Where did the money come from that bought these properties?" to which she replied: "We used to work together; I worked a long time myself after we were married; I clerked for seven or eight years steady, and Clarence worked for a great deal of it; of course, he fell heir to some of the money from his people of late years." She also said: "No money that I fell heir to went into these properties; I worked for his mother a year and a half; the proceeds of my labor went into the general fund, wherever it was needed to be used."

The testimony was not improperly regarded by the chancellor as establishing that special equities existed in favor of the wife, which warranted a departure from the general rule relative to the allowance of alimony to a wife whose right is only such as results from a legal effect of the existence of the marriage relation. Under such circumstances it was within the power of the chancellor to invest the wife with the title in fee to the lots, and the adjustment of the property rights of the parties appearing to us to have been fair and equitable, the decree will be affirmed.

*Decree affirmed.*

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THE CHICAGO, MADISON AND NORTHERN RAILROAD CO.

v.

THE PEOPLE *ex rel.* John Elsesser, County Collector.*Opinion filed February 17, 1904.*

1. TAXES—*amendments to objections should be permitted if made in apt time.* Under section 191 of the Revenue act, amendments, if offered in apt time, should be permitted to objections to judgment of sale for taxes, in order to enable the objector to present any existing valid defense.

2. SAME—*when amendment to objection should be permitted.* On application for judgment and sale "for general and special taxes due for the year 1902," if the court refuses to admit evidence under objections purporting to be to the "delinquent taxes for the year 1903," the defendant should be allowed to amend, where the taxes objected to are the same ones referred to in the application.

APPEAL from the County Court of Stephenson county;  
the Hon. A. J. CLARITY, Judge, presiding.

J. H. STEARNS, (WILLIAM BARGE, of counsel,) for appellant.

LOUIS H. BURRELL, State's Attorney, (HORATIO C. BURCHARD, of counsel,) for appellee.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

At the June term, 1903, the county collector of Stephenson county made application to the county court in said county for judgment and order of sale for the taxes which were then delinquent which had been levied for the year 1902 in said county. The appellant appeared and filed objections to the town taxes for the towns of Buckeye, Ridott, Silver Creek, Harlem and Oneco, to the school taxes in school district No. 37, town 27, and to the road and bridge taxes in the town of Silver Creek, levied against its property. The objections were overruled and

judgment and order of sale were entered, and the appellant has prosecuted an appeal.

The notice of the application for judgment and order of sale stated that the county collector would apply for judgment for the "general and special taxes due for the year 1902," and the objections filed by appellant stated that "now comes [the appellant] and defends against the application \* \* \* for judgment and order of sale for delinquent taxes of the year 1903," etc. On the hearing the appellant offered evidence in support of the objections, to show that the town taxes above referred to were levied for town purposes or some other purpose equally indefinite; that the road and bridge taxes in the town of Silver Creek were levied under the cash system when the town was operating under the labor system, and that the school taxes for district No. 37, town 27, were not levied at a meeting of the school board, and that the certificate of levy was made and signed by the members of the board severally, and while they were separate and apart from each other. The court, however, upon the objection of the appellee, refused to admit such evidence or any evidence offered on behalf of appellant to support its objections, on the ground that the objections filed did not cover the taxes for which judgment and order of sale were sought by the county collector, it being the view of the appellee and the trial court that the "delinquent taxes of the year 1903" were taxes other than the "general and special taxes due for the year 1902." After the court had declined to permit appellant to introduce evidence to sustain its objections on the ground that the objections filed by it were not objections to the taxes upon which the collector was seeking a judgment and order of sale, the appellant moved the court that it be allowed to amend its objections so they would read, in the particular complained of, "now comes [the appellant] and defends against the application \* \* \* for judgment and order of sale for taxes

levied in the year 1902 and becoming delinquent in the year 1903," etc., but the court declined to permit such amendment.

We think there is much force in the contention that the objections were sufficiently specific to cover the taxes upon which judgment and order of sale were sought to be had. The taxes were levied in 1902, and if not paid on or before the tenth day of March, 1903, or so soon thereafter as the books should be returned to the county collector, they became delinquent. (Revenue act, sec. 177.) The taxes levied in 1902, if not paid within the time specified in the statute, became the delinquent taxes of 1903, so that the application and objections referred to the same taxes.

If, however, it be conceded the objections are somewhat indefinite, and if the trial court was in doubt as to whether the objections covered the taxes referred to in the application for judgment and order of sale, we are of the opinion the appellant should have been permitted to amend its objections by incorporating therein apt words to show it was objecting to the taxes levied in the year 1902 and which were delinquent in the year 1903. Section 191 of the Revenue act provides: "In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court." This language is broad and comprehensive, and under it amendments to objections to judgment and order of sale for delinquent taxes may and should be permitted in so far as may be necessary to permit objectors to fairly present any existing valid objections to the application for judgment and sale against their lands for delinquent taxes, if made in apt time. The appellant here had no notice that the objections filed by it would be held by the court insufficient to admit in evidence proofs of what it believed to be a valid objection to a judgment and order of sale for the taxes objected to by

it, until it had entered upon the trial, and so soon as it was advised fully of the ruling of the court it asked leave to amend its objections to meet the view of the court. The amendment sought to be made was as to a matter which could have worked no surprise upon the appellee, as it is apparent the county collector was asking for judgment and order of sale upon the same taxes to which appellant was objecting. When the objections were held insufficient in the particular complained of, the court should have permitted the amendment to be made.

It is claimed the evidence offered does not show the taxes objected to are invalid. The appellant was not given an opportunity to show the invalidity thereof, as the court held that no evidence could be introduced under the objections filed. The evidence offered and rejected, which is incorporated in the record as offers, fairly tends to show that the town taxes in the several towns were levied for town purposes or for some other purpose equally indefinite, which, it has been held, is not sufficient to sustain a tax levy; (*People v. Chicago and Alton Railroad Co.* 194 Ill. 51;) that the road and bridge taxes objected to were levied under the statute authorizing a levy under the cash system when the town was acting under the labor system; and that the school taxes were not levied at a meeting of the school board, but that the certificate of levy was signed by the members of the board acting separately and independently of each other. (*Chicago and Northwestern Railway Co. v. People*, 184 Ill. 240.) We, however, express no opinion as to the validity of any of the taxes objected to, but leave those questions open to be determined upon a new trial, when all the evidence with reference thereto is before the court.

The judgment of the county court will be reversed and the case remanded.

*Reversed and remanded.*

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HENRY YATES, Insurance Superintendent,

v.

THE PEOPLE *ex rel.* Frank O. Anderson.

*Opinion filed February 17, 1904.*

1. **INSURANCE**—*when an insurance corporation is subject to legislative control.* An insurance corporation organized under a special charter containing no reservation of legislative control, which adopts a change of name in accordance with a subsequent act containing a clause subjecting the corporation to the operation of general insurance laws thereafter passed, is as much subject to legislative control as though the reservation were in its original charter.

2. **SAME**—*when charter of insurance company becomes extinct.* Under section 3 of the Insurance act of 1874, which has been held constitutional, (97 Ill. 593, and 101 *id.* 82,) the charter of an insurance company which has ceased for a period of one year to transact the business for which it was organized is deemed extinct, in all respects as though it had expired by its own limitation.

3. **MANDAMUS**—*mandamus should not issue in a doubtful case.* The writ of *mandamus* should not be issued unless the petitioner shows a clear right to the writ and a clear obligation upon the respondent to perform the act sought to be compelled.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. AXEL CHYTRAUS, Judge, presiding.

This is a petition for *mandamus*, filed in the Superior Court of Cook county on January 17, 1903, by the People upon the relation of Frank O. Anderson, defendant in error, against Henry Yates, as insurance superintendent, plaintiff in error, praying that the writ of *mandamus* be directed to the insurance superintendent, requiring him to issue a certificate of authority to the Continental Insurance Company to transact the business of insurance according to the provisions and privileges, granted in the several acts of the legislature of Illinois hereinafter mentioned, and also requiring him to issue certificates of authority to certain persons, thirty-three in number, therein named, appointed by said company as agents. Plaintiff in error, as insurance superintendent, entered

his appearance on January 30, 1903, and filed his answer to the petition on February 5, 1903. On March 4, 1903, a general demurrer was filed by the relator to the answer of plaintiff in error. On the same day, March 4, 1903, plaintiff in error filed an amended answer, and afterwards on March 17, 1903, was granted leave to withdraw his original answer, and, the same being done, the amended answer was ordered to stand as the answer to the petition. On the same day the defendant below, plaintiff in error, had leave to amend the amended answer instanter, and, the same being done, it was ordered, on motion of defendant in error's attorney, that the demurrer of defendant in error to the amended answer stand as a demurrer to the amended answer as amended. The demurrer to the amended answer as amended was sustained. Thereupon, on the same day, to-wit, March 17, 1903, the court ordered that a writ of *mandamus* issue to the plaintiff in error, requiring him to issue a certificate of authority to the Continental Insurance Company to transact the business of insurance in this State upon the payment of the usual fee therefor, and also to issue certificates of authority to persons, appointed by said company as agents in this State, (upon payment of the usual fees therefor,) within three days, according to the prayer of the petition. To the judgment and order of the court plaintiff in error made objection, which objection was overruled, and exception taken. Motions for new trial and in arrest of judgment were overruled. The present writ of error is sued out for the purpose of reviewing the judgment, so entered by the trial court, granting the writ of *mandamus* in accordance with the prayer of the petition.

The petition for *mandamus* alleges that the relator, Frank O. Anderson, is the president of, and a stockholder in, the Continental Insurance Company; that the Continental Insurance Company is an organized and existing fire insurance company by virtue of the following

acts of the legislature of Illinois, to-wit: "An act to incorporate the Tornado Insurance Company," approved February 22, 1861; "An act to amend an act entitled 'An act to incorporate the Tornado Insurance Company,'" approved February 12, 1863; "An act to amend the charter of the Tornado and Fire Insurance Company of Freeport, Illinois," approved March 16, 1865; "An act to amend the charter of the Fire and Tornado Insurance Company," approved March 7, 1867; and "An act to amend the charter of the Continental Insurance Company," approved March 30, 1869. The first act creates the Tornado Insurance Company with power to insure against tornadoes, storms and winds. The second act of 1863 changed the name of the corporation to the Fire and Tornado Insurance Company, and extended its powers to insure against fire and lightning, and provided that its capital stock should consist of premium notes, and cash premiums, and the ten per cent lien of the company by virtue of its charter, the act of 1861 having provided that each policyholder should be a member of the company, and that the company should have, to the extent of ten per cent of the amount insured, a lien upon the building insured to secure the payment of the insured's shares of the company's losses and expenses. The third act of 1865 authorizes the company to receive for the better security of policyholders a guaranty capital of not more than \$500,000.00, such capital to consist in hypothecated stock, mortgages, or real estate, satisfactory to the board of directors or executive committee, and divided into \$100.00 shares, each share having a vote in the election of board of directors. The fourth act of March 7, 1867, changed the name of the company from that of the Fire and Tornado Insurance Company to the "Continental Insurance Company;" and the third section of the act of 1867 provided as follows: "Nothing in this act, or in the act, of which this is an amendment, shall be construed so as to permit said company to do banking business, or exempt

said company from the operation of such general laws as may hereafter be passed upon the subject of insurance companies." The fifth act of 1869, being "An act to amend the charter of the Continental Insurance Company," provided that the board of directors of said company should be authorized and empowered to remove the principal office of the said company to the city of Chicago, whenever the best interests of said company might require said removal to be made. The petition alleges that the principal office of the company was moved to the city of Chicago, in October, 1902, thirty-three years after the passage of the act of March 30, 1869.

The petition further alleges that the company has maintained a full quota of officers and directors, and is engaged in the business of fire and marine insurance; that it has a guaranteed capital of \$100,000.00, and a surplus of \$20,000.00; that, on November 22, 1900, it filed the statutory statement of condition with the insurance superintendent; that, upon its request, it was examined by said superintendent, and a report filed, approving its condition; that it is a practice of the insurance superintendent to issue certificates of authority to any company entitled thereto, and to issue certificates to each agent appointed by duly organized companies, and to receive, as compensation therefor, fifty cents each, and that it is the duty of such superintendent to issue such certificates to such agents; that the company has appointed agents, and applied to the insurance superintendent for such certificates for them, and paid fifty cents in fees for each certificate; and that the superintendent has refused to issue certificates to such agents, and also to issue a certificate of authority to the company.

The amended answer stated that Anderson assumed to be the president and a stockholder of the company; that the company was at one time organized under said acts of the legislature, and was at one time legally in the insurance business, but that it is now engaged in

such business without warrant of law, in this, that its charter is extinct. The answer denies that the company filed with the superintendent a statutory statement of its condition, and denies that examiners appointed by the superintendent passed on and accepted its condition; that the company tendered to the superintendent on or about November 24, 1902, a pretended statement of its condition, which he refused to file for reasons hereinafter stated. The amended answer admits that it has been the practice of the superintendent to issue certificates to the companies and to the agents, and to receive the fees therefor, as alleged in the petition, and that it is the superintendent's duty to issue such certificates upon the payment of the fees, but only when the companies are legally authorized to do business in the State; and it alleges that the said pretended insurance company is not entitled to certificates because its charter is extinct; that it has attempted to appoint agents, but has no power to make such appointment. The amended answer denies that the company ever paid the superintendent any fees, but states that it has sent him checks, which he has not accepted. The amended answer admits that the superintendent has refused to issue agents' certificates.

The amended answer contains the following allegation, to-wit: "That said company has for a period of more than one year, and has for a period of more than one year prior to the beginning of this suit, ceased to transact the business for which it was organized, and further says that the charter of said company should be deemed and held extinct in all respects, as if said charter had expired by its own limitations, and further says that said charter of said company, prior to the beginning of this suit, was and now is extinct in all respects as if said charter had expired by its own limitations; and further says that this court should by decree fix the time within which said company should close its concerns; that, for the reasons aforesaid, the said company has

usurped, intruded into and unlawfully exercised, and is usurping, intruding into and unlawfully exercising a franchise in this State improperly and without warrant of law."

The amendment to the amended answer sets up that the Continental Insurance Company above named, on or about 1887, ceased to transact any business whatever for which it was organized, and remained out of business for sixteen years thereafter, and did no business after it ceased business, except as set forth in the amended answer; that said company then and there abandoned its charter, and ceased for sixteen years prior to the beginning of this suit to exercise any of the corporate powers granted to it by its charter, and thereby omitted necessary acts; and that such omission amounted to a surrender of its privileges and rights as a corporation; that said corporation now exercises powers not conferred upon it by law, and has never since the organization of the insurance department of this State (in 1893) transacted any business within the State with the approval of the department.

FRED H. ROWE, for plaintiff in error.

J. H. WESTOVER, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The main question, presented by the record in this case, is whether or not, at the time of the filing of the petition for *mandamus* herein, and prior thereto, the charter of the Continental Insurance Company had become extinct.

The plaintiff in error claims that he, as insurance superintendent, was under no obligation to issue the certificates of authority applied for, because, under section 3 of the act of 1874 entitled "An act in regard to the dissolution of insurance companies," in force July 1, 1874, (2 Starr & Curt. Ann. Stat.—2d ed.—p. 2285), the charter

of the Continental Insurance Company was as extinct, as though it had expired by its own limitation.

Section 3 of said act of 1874 is as follows: "The charters of all insurance companies incorporated in this State, which, either from neglect or by vote of their members or officers, or in obedience to the decree of any court, have ceased, or shall hereafter cease, for the period of one year, to transact the business for which they were organized, shall be deemed and held extinct in all respects, as if they had expired by their own limitation; and the circuit court shall have authority, upon application, by the petition of the Auditor of State, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns: *Provided*, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors." (Ibid. p. 2285).

The amended answer of plaintiff in error to the petition for *mandamus* alleged, that the Continental Insurance Company had, for a period of more than one year, and for a period of more than one year prior to the beginning of the *mandamus* suit, ceased transacting the business, for which it was organized; and the amendment to the amended answer alleged that said insurance company, on or about 1887, ceased to transact any business whatever, for which it was organized, and remained out of business for sixteen years thereafter, and abandoned its charter, and ceased, for the period of sixteen years prior to the beginning of the *mandamus* suit, to exercise any of the corporate powers granted to it by its charter. Defendant in error, the petitioner below, demurred to the amended answer and to the amended answer as amended, and thereby admitted the truth of the allegations, thus made in the answer. In effect, the plaintiff in error, defendant below, elected to stand by his amended answer, after having duly objected and excepted to the ruling of the court sustaining the demur-

rer thereto. After so sustaining the demurrer to the answer, the judgment or order, allowing the writ of *mandamus* in accordance with the prayer of the petition, necessarily followed. The court seems to have called the case for hearing, after sustaining the demurrer to the amended answer, as amended, and to have permitted the petitioner below to put in evidence the amended answer of the defendant below, and the amendment thereto. This was unnecessary. It was sufficient to decide the case upon the pleadings. The same result, however, followed, as the consequence of permitting the amended answer and the amendment thereto to be introduced in evidence, as would have necessarily followed if the cause had been heard merely upon the pleadings after the demurrer to the answer was sustained. The petitioner below having introduced in evidence, as its own proof, the amended answer and the amendment thereto, is bound by the statements therein, that the company had, for a period of more than one year prior to the beginning of the suit, ceased to transact the business, for which it was organized, and had remained out of business for sixteen years after 1887. (*Fish v. McGann*, 205 Ill. 179).

Did the court below decide correctly in sustaining the demurrer to the amended answer as amended? Defendant in error insists that section 3 of the act of July 1, 1874, as above quoted, has no application here, upon the alleged ground that it impairs the obligation of the contract between the State and the Continental Insurance Company, as embodied in the charter of the latter company; and that, therefore, said section 3, as applied to the company, is unconstitutional. In other words, the doctrine is invoked that the legislature can not repeal, impair or alter the rights and privileges, conferred by the charter of a corporation, against the consent and without the default of the corporation judicially ascertained and declared. (*Bruffett v. Great Western Railroad Co.* 25 Ill. 310).

It is not necessary here to discuss the question, whether the act of 1874 applies to special charters, like that of the Continental Insurance Company, where legislative control is not reserved in such charter. This is so, for the reason, as will hereafter be seen, that the special charter of the Continental Insurance Company did contain such reservation of legislative control.

In *Ward v. Farwell*, 97 Ill. 593, the constitutionality of the Insurance act of July 1, 1874, was under consideration by this court, and, in its main features, the act was there held to be constitutional. Subsequently, in *Chicago Life Ins. Co. v. Auditor*, 101 Ill. 82, we said (p. 87): "The point is made that the statute, under which this proceeding is had, is, as applying to this company, unconstitutional. This question of constitutionality is fully settled by the recent decision of this court in *Ward v. Farwell*, 97 Ill. 593, where it was decided that this act of 1874 was constitutional, and that it was so as applied to the Republic Life Insurance Company, incorporated under a special charter granted before the passage of the act of 1874, to-wit, March 22, 1869, in whose charter no specific reservation of legislative control was contained. By section 5 of an act amending the charter of the present company, approved February 21, 1867, it is provided as follows: 'This act, and the act to which this is an amendment, shall not be deemed to exempt said company from the operation of such general laws, as may be hereafter enacted by the General Assembly on the subject of life insurance.' Afterward, on March 29, 1867, said amendment to the charter, of which the foregoing was a part, was formally adopted by the company. This strengthens the application of the decision in *Ward v. Farwell* to the present case."

Under the decision in the case of *Ward v. Farwell*, *supra*, as interpreted by the subsequent case of *Chicago Life Ins. Co. v. Auditor*, *supra*, it might well be contended that the act of 1874 is constitutional, as applied to the

Continental Insurance Company, incorporated under a special charter granted before the passage of the act of 1874, even though no specific reservation of legislative control had been contained in that charter. But it is not necessary here to so hold.

By the act of March 7, 1867, entitled "An act to amend the charter of the Fire and Tornado Insurance Company," the name of the latter company was changed to the "Continental Insurance Company," and section 3 of said act of 1867 provided as follows: "Nothing in this act, or in the act of which this is an amendment, shall be construed so as to \* \* \* exempt said company from the operation of such general laws, as may hereafter be passed upon the subject of insurance companies." By adopting the change of name, provided for in the act of 1867, the insurance company adopted the act, and made it a part of its original charter. Indeed, this is not denied by counsel for defendant in error. In the brief of defendant in error it is said: "For the purposes of this argument it may be admitted that the amendatory act of March 7, 1867, was accepted by the company and its stockholders, and thereby constituted a valid reserve power in the legislature to subject the company to certain legislative control." Even, therefore, if it were held, that the charter of this Continental Insurance Company was a contract which could not be altered or changed by any subsequent legislature without the consent of the company, yet it must be regarded as a fact that here the company has given such consent. It consented by section 3 of the act of 1867, which was an amendment of its charter, that nothing in the act of 1867, or in the act of which the act of 1867 was an amendment, should be construed to exempt the company from the operation of such general laws, as might thereafter be passed upon the subject of insurance companies. Consequently, the charter of this company stands on the same footing, as though full legislative control had been reserved in the original act.

All general laws on the subject of insurance companies are applicable to the Continental Insurance Company. It follows that the act of 1874—providing that the charters of all insurance companies, which have ceased for the period of one year to transact the business for which they were organized, shall be deemed and held extinct in all respects as if they had expired by their own limitation—is fully applicable to the Continental Insurance Company. The latter company appears upon this record as having ceased for the period of one year to transact the business for which it was organized, and, therefore, under the act of 1874, which was a general law passed after the act of March 7, 1867, its charter must be deemed and held extinct in all respects as if it had expired by its own limitation.

It is said by counsel for defendant in error that the object of section 3 of the amendatory act of March 7, 1867, reserving to the legislature the power of control, was merely to subject the company to legislative control, so far as subsequent legislation might be passed, defining the duties and obligations of the company regarding its business, and the control of its corporate affairs. We think, however, that the language of section 3 is broad enough to indicate something more than legislative control over the mere business of the corporation. By the terms of section 3 of the act of 1867 the company is not to be exempt from the operation of such general laws as may thereafter be passed upon the subject of insurance companies. Surely, the provision in section 3 of the act of 1874 is a general law upon the subject of insurance companies. It provides that the charter of any company, which from neglect shall cease for the period of one year to transact the business, for which it was organized, shall be deemed and held extinct in all respects, as if it had expired by its own limitation, and, by accepting the act of March 7, 1867, the Continental Insurance Company consented to be subject to the pro-

visions of this general law. As upon the present record, as it stands, it is admitted to have ceased to transact business for the period of one year, it comes within the terms of section 3 of the act of 1874.

Defendant in error claims that, at the time when plaintiff in error refused a certificate of authority to the Continental Insurance Company, and licenses to its agents, on the ground that the charter of the company was extinct under the act of 1874, the State had waived any right to declare such a forfeiture, if it ever existed. In view of the allegations, contained in the answer, and of the admission of their truth by the filing of a demurrer, it cannot be said that the Continental Insurance Company was in the exercise of the privileges and in the performance of the functions, claimed to have been exercised and performed by it. Whether or not the non-user of corporate franchises for a fixed period creates a cause of forfeiture of the charter, so that no advantage can be taken of such non-user by any one except the State in a suit brought for that purpose, is a question, which does not arise here, because, by the terms of section 3 of the act of March 7, 1867, the Continental Insurance Company consented that its charter should become extinct, if it ceased for the period of one year to transact the business for which it was organized.

It is well settled that a writ of *mandamus* will not be issued, unless the petitioner shows a clear legal right to the writ; nor will such writ be issued, unless the party, applying for it, shall show a clear obligation on the part of the person, or body, sought to be coerced, to do the thing, whose performance is asked for by the issuance of the writ. (*People v. Sellars*, 179 Ill. 170; *People v. Town of Mount Morris*, 145 id. 427; *People v. Johnson*, 100 id. 537; *Springfield and Illinois Southeastern Railway Co. v. County Clerk*, 74 id. 27). Moreover, "the party who seeks to compel the performance of an act must set forth every material fact, necessary to show that it is the plain duty

of such party to act in the premises, before the courts will interfere." (*People v. Sellars, supra*). "In doubtful cases it (the writ of *mandamus*), should not be granted." (*Springfield and Illinois Southeastern Railway Co. v. County Clerk, supra*). Certainly, in view of what is said, it is at least doubtful whether or not the petitioner herein has a clear right to the writ, and whether or not the plaintiff in error is under a clear and undoubted obligation to do the thing prayed for in the petition.

For the reasons above stated, we are of the opinion that the court below erred in sustaining the demurrer to the amended answer as amended. Accordingly, the judgment of the court below is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

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HERMAN KLOSS

v.

J. WYLEZALEK *et al.*

*Opinion filed February 17, 1904.*

1. HOMESTEAD—widow cannot have two homestead rights at the same time. A widow who re-marries and goes with her second husband to his home abandons her homestead rights in the first husband's property although she leaves the second after six months and returns to the old home, where there is nothing to show that it is not her right and duty to return to her second husband or that she will not avail herself of such right.

2. SAME—an equivocal intention to return is not sufficient to prevent abandonment. One cannot cease to occupy homestead property with the intention to return, or not, according to future circumstances and conditions, and still retain the homestead right.

3. SAME—abandonment of homestead by widow is binding upon minor children. Abandonment by a widow of the homestead property deprives the minor children of their homestead right in property.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. B. R. BURROUGHS, Judge, presiding.

H. CLAY HORNER, for plaintiff in error.

GORDON & IROSE, for defendants in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Emanuel Wylezalek was the owner of the north-west quarter of the south-west quarter and the west fractional half of the north-west quarter of section 24, etc. He, together with his wife, Michalena, mortgaged both tracts to plaintiff in error, releasing, we assume, their right of homestead, which, however, is immaterial in the decision of this case. Afterwards the husband died intestate, leaving surviving him Michalena, his widow, and six children. The widow gave a second mortgage to plaintiff in error on the same land. She, of course, had no right in the fee at that time which she could mortgage, but thereafter two of the children died intestate and unmarried, and she inherited their undivided interest, being one-ninth thereof, which, by virtue of the last named mortgage, with its covenants of warranty, inured to the plaintiff in error and became subject to his second mortgage. Whether the homestead right was released in that mortgage does not appear. After the death of the two children he filed a bill to foreclose both mortgages in one proceeding, and a decree of sale was rendered in pursuance thereof, under which the first piece of land above described was sold to satisfy the first mortgage and the one-ninth of the second tract was sold to satisfy the second mortgage. Plaintiff in error obtained a deed for said undivided one-ninth and then filed this bill to partition the said fractional quarter. By his bill he sets up title to the undivided one-ninth thereof in himself and to two-ninths in each of the four surviving children, their interest subject to their mother's dower. Decree for partition was rendered finding all interests as set up in the bill, but decreeing the eight-ninths owned by the children subject to a homestead right in their mother as well as dower. Commissioners were appointed to set off the

dower and homestead and make partition, but they reported that dower and homestead could not be assigned and partition made, appraising the value of the premises at \$300. The court approved their report and entered a decree ordering the land sold subject to said dower and homestead, and from that decree plaintiff in error has sued out this writ.

There is but one controversy between the parties in this court, and that is, whether or not the circuit court committed error in adjudging homestead to the surviving wife of Emanuel Wylezalek in the eight-ninths of said land and ordering the same sold subject thereto. There was, in fact, no issue in the court below on that question raised by the bill and answer, but it seems that this omission is not insisted upon in this court.

The testimony shows that the widow, after the death of her husband, re-married, and is known in this record as Mrs. Gorzney. She testified as follows: "After marrying said Gorzney I left my said homestead of my deceased husband and went to reside on a lot in Chester, Illinois, on which lot said Gorzney resided. Said lot was, and yet is, owned by said Gorzney and occupied by him as a homestead, and was so owned by him prior to our marriage. I lived with him on said lot in Chester for about six months, when, as we could not agree, I went back to the real estate sought to be partitioned in this suit, and have resided thereon with my children ever since. I am still the wife of Stanislaus Gorzney and he still lives on said lot in Chester. My children did not live on the premises sought to be partitioned while I was living with said Gorzney. Some of my children went with me to Chester, some did not. Some remained in the country. I did not move all my things to Chester, but left some of them on the place. We moved to Chester with the intention of trying it and to see if we could get along and like it, and if we did not we could move back. We could not get along and moved back."

It was insisted in the court below, and is again urged here by counsel for the plaintiff in error, that upon this testimony, which was all that was introduced on that subject, the widow had abandoned whatever homestead rights she had in the premises in question, and we think the position well taken. When she married her second husband and removed with him to his homestead in Chester, she unquestionably intended to, and did, at least for the time being, abandon her home on this land. She does not claim that she did so with a purpose and intention of returning and re-occupying the old home. All that she claims is, that she went to Chester with the intention of trying it and to see if she could get along and like it, and if not, could move back, and then says, "we could not get along and moved back." For anything appearing in her testimony she may at any time again change her mind and return to her husband's homestead and continue to live there, and there is nothing whatever in this record to show that it is not her duty, as his wife, to do so. "Where there is a removal from the homestead premises it will be taken as an abandonment, unless it clearly appears that there is the intention to return and occupy it." (*Jackson v. Sackett*, 146 Ill. 646, and cases cited.) An equivocal intention to return is not sufficient. (*Cabeen v. Mulligan*, 37 Ill. 230.) In other words, a person cannot cease to occupy a homestead with the intention that he or she may or may not return, depending upon future conditions or circumstances, and still retain the homestead right.

The case of *Buck v. Conlogue*, 49 Ill. 391, is somewhat similar in its facts to the case at bar, with the distinction that it there appeared that after her second marriage Mrs. Morse (the party claiming the homestead and removing with her husband to property owned by him in Sterling) still entertained the intention of returning with her husband to the former home in LaSalle, but when that intention was to be executed did not appear,

and she had not returned at the time the action was brought in which she attempted to set up her homestead rights. We there announced the uniform holding of this court to be, "that where the husband removes from the homestead with his family and acquires another home, the right is lost,"—citing *Moore v. Titman*, 43 Ill. 169, and *Cabeen v. Mulligan*, *supra*. And we further said: "From the evidence in the cause we are satisfied that there was such an abandonment by the widow as precludes her from asserting the right. Her husband's home is her home, and she cannot insist that she has not acquired a new one, and by its acquisition she lost the right of homestead."

That a party cannot, under our statute, have two rights of homestead at the same time is too well settled to need the citation of authority, and we are at a loss to perceive how the claim of Mrs. Gorzney to a homestead in this land can be sustained without violating that well settled principle. The fact that she had returned to the premises before this proceeding was begun is, we think, unimportant. As already said, for anything appearing in this record she may at any time lawfully and with perfect right return to the home of her husband, and she does not even say that she does not intend to do so. His home being her home, and it being her duty, as his wife, to live with him, every presumption must be that she will perform her duty in that regard. If the husband should die, she could unquestionably, on the facts in this record, claim and maintain her right of homestead in the Chester property. Having an undisputed right of homestead there she cannot have it here. That her abandonment terminated the right of homestead in her children has also been repeatedly decided. Although infant children have rights in the homestead, they are necessarily under the control of their parents during the joint lives of the latter, and as the mother becomes the head of a family upon the death of the father, her abandonment of

the homestead will deprive such children of their homestead rights. *Shepard v. Brewer*, 65 Ill. 383.

It is insisted, however, by counsel for defendants in error, that under his bill and the decree of the circuit court plaintiff in error cannot question the decree below in adjudging homestead. Their position is, that, inasmuch as he claims by his bill but one-ninth of the property in fee, and the decree gave him that, he has received all he asked for, or that as the homestead is decreed only against the eight-ninths he cannot complain. However plausible the contention may at first impression seem to be, we do not regard it as sound. The interests as set up in the bill, though distinct, were held by the parties in common, and, as shown by the report of the commissioners, with the homestead upon the undivided eight-ninths, could only be severed by a sale of the premises. Had the court decreed the eight-ninths to the children subject only to dower, as averred in the bill, the sale might have been, and presumably, in the absence of proof to the contrary, would have been, void and the tenancy in common severed by partition. The law favors partition of land among tenants in common rather than a sale thereof and a division of the proceeds, and it is only when the land itself cannot be partitioned that a sale may be ordered. In this view of the law we think the decree of the court below erroneously adjudging homestead to Mrs. Gorzney was harmful to plaintiff in error, and therefore he has the right to complain.

The power to order a sale subject to the homestead is not involved here. That and other questions which might arise upon the record are waived by counsel and not here considered.

For the reason stated the decree of the circuit court will be reversed and the cause remanded to that court, with directions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*

## WILLIAM HALE THOMPSON

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.*Opinion filed February 17, 1904.*

1. SPECIAL ASSESSMENTS—*lack of jurisdiction, to be available for collateral attack, must appear on face of record.* Lack of jurisdiction to enter judgment of confirmation must appear upon the face of the record in order to furnish ground for collateral attack.

2. SAME—*new hearing is not required to eliminate illegal item of cost.* Upon reversal of a confirmation judgment because of the illegal inclusion of the cost of making and levying the assessment, the trial court, on re-docketing the case, may eliminate the objector's proportionate share of such illegal item, re-cast the assessment roll and enter judgment. (*McChesney v. Chicago*, 205 Ill. 528, followed.)

3. SAME—*what not a valid objection on an application for judgment of sale.* That the engineer's estimate of cost was not made a part of the record of the improvement board's first resolution is not a valid objection when first raised upon application for judgment of sale.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

F. W. BECKER, for appellant.

ROBERT REDFIELD, and WILLIAM M. PINDELL, (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

This is an appeal from a judgment for sale entered in the county court of Cook county to satisfy the first installment of a special assessment for paving West Van-Buren street from South Paulina street to South Kinzie avenue, in the city of Chicago. The appellant appeared and filed objections. The validity of the judgment confirming the original assessment was before this court at a former term, (*Thompson v. City of Chicago*, 197 Ill. 599,) when the judgment was reversed and the cause remanded.

It is first contended that the judgment of confirmation upon which this judgment for sale is based is void, for the reason that the county court was without jurisdiction to render the judgment of confirmation, on the ground that the proceedings to confirm said special assessment, after the judgment confirming the same had been reversed by this court, was re-docketed in the county court without proper notice to the appellant. The judgment of confirmation entered after the case was re-docketed recites that due notice to re-docket the proceedings had been given the appellant. We are of the opinion that finding was not overcome by the fact that a notice to re-docket, found among the files in that proceeding, states that a motion to re-docket the proceedings would be made on the 25th of July, 1902, and that the record shows the order re-docketing the proceedings was not entered until the following day. In that state of the record, the court, in case of a collateral attack upon the judgment of confirmation, will presume that the motion to re-docket the proceedings was made on the 25th of July and that action was deferred thereon until the following day, when the order re-docketing the case was duly entered, and that the court, by reason of such delay, did not lose jurisdiction to enter the order re-docketing the case. The lack of jurisdiction must appear upon the face of the record in the confirmation proceeding, otherwise such lack of jurisdiction cannot be taken advantage of in a collateral proceeding. *Dickey v. People*, 160 Ill. 633; *Casey v. People*, 165 id. 49; *Young v. People*, 171 id. 299.

The original judgment of confirmation was reversed by this court by reason of the fact that the estimate of the cost of the improvement contained an item of six per cent of the amount of the estimated cost of the improvement, for making and levying the assessment. The county court, upon the proceedings being re-instated in that court, eliminated appellant's proportionate share of said item of cost and re-cast the assessment roll and

then entered a judgment of confirmation, and it is contended that the county court was without power to eliminate said item of cost from the original assessment and to then enter judgment confirming the assessment. This precise question was before this court in *McChesney v. City of Chicago*, 205 Ill. 528, where the question was decided adversely to the view of the appellant.

It is further contended that no itemized estimate of the cost of the improvement was made a part of the record of the first resolution of the board of local improvements. The fact that the engineer's estimate of the cost of the improvement was not made a part of the record of the first resolution of the board of local improvements, if raised upon the application for judgment of confirmation, would have been a good objection, (*Bickerdike v. City of Chicago*, 203 Ill. 636,) but it does not constitute a valid objection when raised upon application for judgment for sale. *Gage v. People*, (*ante*, p. 61.)

It is next contended that the specifications for the work contained the so-called alien labor clause. The proof found in this record upon that question is the same as the proof found in the record in *Gage v. People*, *supra*, and shows that the bid was not based upon said specifications and that the specifications in no way affected the cost of the improvement, and under the holding in that case furnished no ground to justify the county court to refuse judgment for sale to satisfy said special assessment.

The judgment, as entered in the county court, is not in proper form, and for the reason assigned in the *Gage case*, *supra*, it must be reversed.

The judgment of the county court will be reversed and the cause remanded, with leave to the attorney for appellee to move for, and with directions to the county court to enter, a judgment in compliance with section 191 of chapter 120 of Hurd's Statutes of 1899.

*Reversed and remanded, with directions.*

JAMES A. MURPHY

v.

THE PEOPLE *ex rel.* S. B. Raymond, County Collector.*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*when an order amending judgment is not final.* An order amending the record of a prior judgment sustaining objections and refusing judgment of sale for taxes is not such a final order as is subject to appeal or writ of error, where the amendment does not change the judgment in such a manner as to affect the rights of the parties thereunder.

2. JUDGMENTS AND DECREES—*when amendment of record of judgment does not change rights of parties.* Where all of the objections to an application for judgment of sale go to the jurisdiction of the court, an order "that all of said objections be and are hereby sustained and that application for judgment is hereby refused," is not changed, so as to affect the rights of the parties, by striking the words "all of said" from the record of the order.

WRIT OF ERROR to the County Court of Cook county;  
the Hon. ORRIN N. CARTER, Judge, presiding.

W. J. DONLIN, (GEORGE A. MASON, of counsel,) for  
plaintiff in error.

W. P. THORNTON, (FRED H. ROWE, of counsel,) for  
defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the  
court:

The writ of error in this case was issued to the county court of Cook county to bring up the record of that court amending, on December 30, 1902, its record of a judgment entered on July 20, 1899, in favor of the plaintiff in error. The errors assigned are, that the court erred in admitting improper and incompetent evidence upon the hearing of the motion of the defendant in error to amend the record and in entering the order amending the same.

The record certified to this court shows the following proceedings: On June 16, 1899, the county collector of

Cook county applied to the county court for judgment and order for sale against the lots of plaintiff in error, James A. Murphy, for the delinquent fifth installment of special assessment No. 29 levied by the village of Park Ridge, in said county. To the application Murphy entered his special appearance for the sole and only purpose of contesting the jurisdiction of the court for the reasons set forth in ten written objections then filed. The objections challenged the jurisdiction of the court on the ground that the return of the delinquent list was not made as required by law; that the publication of the delinquent list was not made according to statute; that the application was not made in the manner required by law; that the court confirming the assessment acquired no jurisdiction for want of sufficient publication made or notice given, and because the ordinance for the improvement was void, and that the land of Murphy had been arbitrarily subdivided. On July 20, 1899, the objections so made to the jurisdiction of the court coming on to be heard, the court entered the following order: "It is ordered by the court that all of said objections be and are hereby sustained and that application for judgment is hereby refused." On December 30, 1902, the county collector filed his motion to amend said record, as was afterward done. Murphy resisted the motion, and upon the hearing the court received in evidence, against his objection, the minute book of the clerk written at the time the judgment was entered, as follows: "Thursday, July 20, 1899.—162 spcl. obj.; objs. sust. & j. refused," and also the testimony of the record writer that at some time afterward he wrote the record from those minutes. He testified that "spcl." meant special; "objs." objections; "sust." sustained, and "j." judgment, and that the whole thing appearing in the minute book meant, "Objections sustained and judgment refused." The court sustained the motion and entered an order amending the record *nunc pro tunc* as of July 20, 1899, so as to read as follows:

"It is ordered by the court that objections be and the same are hereby sustained and said application for judgment is hereby refused."

Appeals from judgments of the county court either giving or refusing judgment for taxes and special assessments, and writs of error to review such judgments, are allowed by section 192 of the Revenue act. (Hurd's Stat. 1899, p. 1426.) In the case now under review an issue was made as to the jurisdiction of the county court to entertain the application and render judgment against the lots of plaintiff in error, and that issue was decided in his favor and final judgment was entered on July 20, 1899. The collector took no appeal from that judgment and it stands in full force, not reversed, modified or set aside. Of course, plaintiff in error does not now seek to reverse the judgment in his favor, but he asks us to reverse an order which did not in any manner affect such judgment, but which amended the record so that it no longer shows that the judgment was based on a finding in his favor as to all of the objections filed. If there had been an appeal or writ of error to review the judgment, that finding would not have affected the decision one way or the other. The jurisdiction of the court was challenged on several distinct grounds, and if either of them was sufficient to defeat the application and was properly sustained the judgment would have been affirmed, regardless of the finding of the court sustaining all of the objections. Judgment against the lands of the plaintiff in error was refused, and there has been nothing done by way of amendment under which the lands could be sold, and even the conclusive effect of the judgment as an adjudication that the court was without jurisdiction has not been destroyed. An order made subsequent to a judgment may be final and appealable where it changes or sets aside a judgment or affects the substantial rights of the parties in its enforcement, but nothing of that kind has been done in this case. It does not even appear

that in any pending or future proceeding the rights or interests of the plaintiff in error can be in any manner affected by the amendment.

We are of the opinion that the order of the county court is not such a final judgment as can be reviewed upon a writ of error, and the writ is therefore dismissed.

*Writ dismissed.*

207	840
209	549

HARRIET HOGUE *et al.*

v.

SILAS STEEL *et al.*

*Opinion filed February 17, 1904.*

1. TRUSTS—*parol proof of resulting trust must be clear.* A resulting trust may be established by parol proof, but the burden is upon the party asserting the trust to establish the same by clear and convincing evidence.

2. HUSBAND AND WIFE—*common law rule as to a married woman's property presumed to prevail in foreign State.* In the absence of proof to the contrary it will be presumed the common law rule that the wife's money and the income from her real estate became the property of her husband upon marriage prevails in a foreign State.

3. SAME—*statute relating to married woman's property does not divest husband's rights acquired in foreign State.* The Illinois statute authorizing a married woman to retain title to her own property does not divest title to the wife's property which has vested in the husband during residence in a foreign State where the common law rule relating to married women's property prevails.

APPEAL from the Circuit Court of Clay county; the Hon. S. L. DWIGHT, Judge, presiding.

THOMASON & BOYLES, for appellants.

ROSE & MCCOLLUM, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery for a decree partitioning and allotting the east half of the south-east quarter of section 27, town 5, north, range 6, east of the third prin-

cial meridian, in Clay county, among the heirs-at-law of one William Steel, deceased. In the proceeding a cross-bill was filed asking that the title to the south-east quarter of the south-east quarter of the said tract be declared to be in one Harriet Hogue, and that the title to the north-east quarter of the south-east quarter of said tract be established in one Emma Cook.

Said William Steel, deceased, received a deed purporting to convey said tract of land to him on the fourth day of October, 1872. At once thereafter he made his home on said tract of land and resided there with his family until the time of his death, which occurred on the 11th day of January, 1901. He was a householder and the head of a family, and the tract of land was his homestead and did not at any time exceed \$1000 in value. On the 26th day of March, 1891, said William Steel signed and acknowledged a deed purporting to convey the tract of land to his wife, Catherine Steel, but the wife did not join as a grantor in such deed, and the husband and the wife remained in possession of the homestead estate after the conveyance, during the remainder of his lifetime. The lands described in this deed being the homestead of the grantor and said Catherine, his wife, and being of value not exceeding \$1000, and the possession remaining with the grantor, the deed to Catherine was without any legal efficacy to invest her with any interest or title in the land. (*Anderson v. Smith*, 159 Ill. 93; *Despain v. Wagner*, 163 id. 598.) The title therefore remained in said William Steel. Catherine, the wife, after the death of William, her husband, executed a deed purporting to convey the south forty-acre tract of the land to one Harriet Hogue, her daughter by a former husband, and at the same time the said Catherine executed a deed purporting to convey the north forty-acre tract to Emma Cook, a daughter by said William Steel, deceased. As Catherine had no interest in the fee of these lands her grantees took no interest in fee by reason of these deeds. Cath-

erine, the widow of said William Steel, deceased, died March 13, 1902, and on the 10th day of May, 1902, the appellee Silas Steel, a son of said William Steel, deceased, filed this bill in chancery against the other heirs-at-law of said Catherine Steel for a decree declaring the title to the land to be in the heirs-at-law of said William Steel, deceased, and for a decree partitioning the same among the heirs-at-law of said William Steel. Emma Cook and Harriet Hogue filed a cross-bill, in which they alleged said William Steel, deceased, purchased the said lands with money which belonged to his said wife, Catherine Steel, and without the knowledge or consent of the wife, and in violation of her rights, procured the title to the land to be conveyed to himself. The contention of the complainants in this cross-bill was, that a trust arose by operation of law in favor of Catherine Steel, and that said William Steel held the title to the land in trust for said Catherine; that he executed the deed to her in order to carry the trust into legal execution; that said Catherine thereupon became vested with the legal title to the lands, and conveyed good title to one tract thereof to one of the complainants in the cross-bill and good title to the other tract to the other of said cross-complainants. Upon a hearing a decree was entered dismissing the cross-bill and granting the prayer of the original bill.

We think the chancellor correctly decided that the evidence did not disclose facts requisite to create a resulting trust in favor of Catherine Steel. The burden of proof is on the party who asserts the existence of an implied trust. It may be established by parol proof, but the long established rule is, that the proof of the facts necessary to create the trust must be clear and convincing. (*Francis v. Roades*, 146 Ill. 635; *Koster v. Miller*, 149 id. 195; 15 Am. & Eng. Ency. of Law,—2d ed.—1174.) William Steel and wife moved to Illinois from Ohio in 1872, and he purchased the land in October of that year.

We find in the record proof of statements made by him to several witnesses, in substance, that "the money that bought the land was his wife's money." To Mr. Chesley he said he came out west (from Ohio) with his wife's money; that he invested it in this land and took the title in his own name. It was, however, proven by witnesses who had knowledge of the transaction which resulted in the purchase of the land, that the purchase price thereof was \$500, and that Steel, in payment of that sum, gave a team of horses and their harness, and a wagon, and \$250 in money. The same witnesses testified Steel procured the money by selling wheat which he raised and marketed before leaving the State of Ohio. Steel and his wife were married in Ohio in 1851, 1852, 1853 or 1854, the testimony as to such date being uncertain. She was a widow and acquired some property from the estate of her former husband, and there is some testimony that she owned some land in her own right. Steel had little or no property. The property of the wife was used in buying a home in Westchester, Ohio. This property was sold and other property bought in Monroe Mills, Ohio. The last named premises were sold and property purchased near Mt. Vernon, Ohio. The dates of the sales and purchases of these different properties are not shown, nor is it disclosed in whose name the titles thereto, or any of them, were taken. In 1872 the Mt. Vernon property was disposed of, but for what price or how the same was paid for is not shown. Nearly or quite twenty years elapsed after their marriage before they moved to Illinois. There is no proof to show that the wife during that period kept separate control or ownership of the proceeds of the sale of the real estate. Indeed, the theory of the cross-bill is that the husband had possession of the moneys of the wife. The income of the wife's real estate and the money belonging to the wife, according to the common law, became the property of the husband, and so, also, did the choses in action belonging to her,

if reduced to possession by the husband. There being no proof to the contrary, we are to assume the common law prevailed in the State of Ohio during the period from 1851 to 1872. (*Crouch v. Hall*, 15 Ill. 263; *Tinkler v. Cox*, 68 id. 119; *Schlee v. Guckenheimer*, 179 id. 593.) It cannot be said the evidence discloses that this rule of the common law had not operated to invest the husband with the title to the proceeds of the sale of the real estate interests of the wife. The statute adopted in this State authorizing a married woman to hold and retain the title to her property has no effect to divest the title which has vested in the husband during their residence in a sister State where the common law rule obtained. (*Tinkler v. Cox*, *supra*.) The proof was therefore insufficient to show that Catherine Steel had legal ownership or title to any money or property which could have been applied by her husband in the purchase of the land. (*Keith v. Miller*, 174 Ill. 64; *Erringdale v. Riggs*, 148 id. 403; *Ossna v. Walters*, 100 id. 623.) That William Steel paid, in part, for the land in a team of horses, the harness for them, and a wagon, was well proven. There is no proof the wife had any interest therein.

The statements proven to have been made by William Steel as to the ownership of the money used in the purchase of the land may be fairly understood to mean no more than that as he had come into the possession of an equal or greater amount in money or property through his wife, she, as a mere matter of abstract right, ought to be regarded to be the owner of any money or property used in the purchase of land for their home.

The evidence, when carefully considered, was properly considered by the chancellor to be insufficient to show that Mrs. Steel was the owner of the money and property which were used in paying for the land.

The decree is affirmed.

*Decree affirmed.*

JOSEPH BAUMGARTNER *et al.*

v.

S. E. BRADT *et al.**Opinion filed February 17, 1904.*

207	845
210	*598
207	845
212	*286

1. **STREAMS**—*owner of easement in stream may compel removal of obstruction.* One having a perpetual easement in the maintenance of a ditch and the unobstructed flow of water through it is entitled to a mandatory injunction directing the removal of an obstruction.

2. **SAME**—*mandatory injunction may be granted to compel restoration of natural channel.* A mandatory injunction may be granted to compel the restoration of water to the natural channel from which it has wrongfully been diverted, whether such channel is a natural water-course or an artificial ditch.

3. **PLEADING**—*answering over waives right to assign error on overruling of demurrer.* By answering a bill after the overruling of a demurrer thereto the defendant waives the demurrer except so far as he may have the same advantage on final hearing, and he can not assign for error the overruling of the demurrer.

4. **SAME**—*when bill is not multifarious.* If several property owners seek relief against the same injury on the same grounds, a bill in which they join as complainants is not, for that reason, multifarious.

**APPEAL** from the Circuit Court of DeKalb county; the Hon. CHARLES A. BISHOP, Judge, presiding.

JONES & ROGERS, for appellants.

A. G. KENNEDY, and CARNES, DUNTON & FAISSLER, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill, filed by the appellees against the appellants to enjoin the obstruction of a channel, or stream, alleged to be a natural outlet for water from the premises of appellees, and the highway running along the south side thereof. After answer filed by the defendants below, a decree was entered in accordance with the prayer of the bill. The present appeal is from the decree so entered.

Three of the appellees, who filed the bill are commissioners of highways of the township of DeKalb in the county of DeKalb, and the other appellees are the owners and occupants of the south half of section 8 and of the south-west quarter of section 9 in said township. The defendant below, Joseph Baumgartner, is the owner of the north-west quarter of section 16 in said township, subject to the life estate of another party therein, and wherein the other of the defendants below have some interest. The decree found that there was, and had been for more than twenty years last past, a public highway extending along the south side of the south half of said section 8 and the south-west quarter of said section 9, and along the north side of said north-west quarter of said section 16; that there was a stream of water, which flowed northerly across the said road in the south half of section 8 near the west side thereof, thence easterly through said south half to the east line thereof, thence southerly across the south-west corner of the south-west quarter of section 9, and which again crossed in a southerly direction said highway, and ran across, in a southerly direction, the north-west quarter of said section 16; that the water in said stream flowed in the course above specified, and had done so for a time whereof the memory of man runneth not to the contrary; that the course of the water, as above specified, is a natural water-course, and that the stream of water, running in a southerly direction as above set forth through the north-west quarter of said section 16, had cut a channel about five feet deep through said north-west quarter; that said channel was a natural outlet for the water from said road and from the south half of section 8, and the south-west quarter of section 9; that the defendants below, appellants here, or some person acting for them and under their direction, in September or October, 1901, unlawfully filled up and obstructed said channel upon the north-west quarter of said section 16, and thereby obstructed the flow of the

water in the channel, so as to throw the water back upon the highway, and upon the premises belonging to appellees, thereby overflowing the highway and said premises; that appellants have neglected and refused to remove said obstruction and open said channel; that the obstruction of the channel has caused great and serious injury to said highway, and to the lands of appellees, and the crops growing thereon, and that the appellants have threatened to further fill up and obstruct said channel or stream; that, if appellants are permitted to continue the obstruction of said channel and the flow of said water, it will result in irreparable damage to the highway and to the property of appellees; and that appellees are entitled to the use of the channel upon the north-west quarter of section 16, as an outlet for the water on the highway and on the lands of appellees, free from any and all obstruction by appellants. The decree made the preliminary injunction, issued in the cause, perpetual, and ordered that appellants be enjoined from continuing the obstruction of the channel upon the north-west quarter of section 16, and from permitting the channel to remain filled up or obstructed. The decree furthermore ordered that appellants should proceed forthwith to remove said filling and obstruction, so as to restore the channel to its former depth, and so as to restore to appellees the right to the free flow of the water through the portion of the channel so obstructed.

One, whose right to the maintenance of a ditch, and to the unobstructed flow of water through it, constitutes a perpetual easement, is entitled to a mandatory injunction, directing the removal of an obstruction. (*Hunt v. Sain*, 181 Ill. 372.) A mandatory injunction may be granted to compel the restoration of water to its natural channel, which has been wrongfully diverted therefrom; and, in such case, it makes no difference whether the channel dammed up, or from which the water is diverted, is a natural water-course or an artificial ditch. (*Hunt v.*

*Sain, supra*; High on Injunctions, sec. 804; *Earl v. DeHart*, 12 N. J. Eq. 280).

*First*—The appellants urge, as the first reason for a reversal of the decree, that the bill is multifarious. It is said that the interests of the appellees, named Cheasbro, owners of the south half of section 8, are separate from the interests of the commissioners of highways, and that the interests of the appellee, named Twombly, the owner of the south-west quarter of section 9, are separate and distinct from the interests of the Cheasbros, and also separate and distinct from that of the commissioners of highways. The appellants, in the court below, filed a general demurrer to the bill, which was overruled; and they claim that the demurrer should have been sustained, upon the ground that the bill was multifarious. But the rule is, that a defendant, by answering a bill in chancery after the overruling of his demurrer thereto, waives the demurrer, except so far as he may have the same advantage on final hearing; and he cannot assign for error the ruling upon the demurrer. (*Gordon v. Reynolds*, 114 Ill. 118; *Bauerle v. Long*, 165 id. 340; *Stirlen v. Jewett*, id. 410; *Gleason & Bailey Manf. Co. v. Hoffman*, 168 id. 25). In the present case, after the demurrer, filed by the appellants, was overruled, they answered the bill; and we said in *Gleason & Bailey Manf. Co. v. Hoffman, supra*: "By answering, after a general demurrer is overruled, the right to assign error in overruling the demurrer is waived."

But, independently of the question as to the waiver of the right to assign for error the overruling of the demurrer, the rule is well settled in this State that, if several property owners seek relief against the same injury upon the same ground, a bill, in which they join as complainants, will not be regarded as multifarious. A bill is generally understood to be multifarious when distinct and independent matters are improperly joined in one bill and thereby confounded, as, for example, where several perfectly distinct and unconnected matters against

one defendant are united in one bill. It has been held that, where a tax is sought to be levied without authority, several property owners, having a common interest in the subject and asking relief against the same injury on the same ground, may join in a bill to restrain its collection, as a common object, in which all the complainants are interested, is sought, and against parties, who are doing the alleged wrong. (*Mount Carbon Coal and Railroad Co. v. Blanchard*, 54 Ill. 240; *Hickey v. Chicago and Western Indiana Railroad Co.* 6 Ill. App. 172). "If the act complained of affects a common right of several persons, whose interests are, in a legal point of view, substantially the same, proceedings for an injunction may be instituted by one or more of them in behalf of the others." (High on Injunctions, sec. 1549.) "Upon the question of the joinder of parties in proceedings to restrain a private nuisance, it is held that, where the grievance is common to several different property owners, they may unite in one action for an injunction." (High on Injunctions, sec. 757). In the case at bar, although some of the appellees owned one piece of land, and others of the appellees owned another piece of land, and the highway commissioners are interested in the highway running along the south side of the land, yet the obstruction of the channel, carrying off the water from the highway and from the lands of the appellees, is one and the same injury, suffered by them all. All the appellees have a common interest in the matter of removing the obstruction, which closes the outlet of the water from the lands in question, and from the highway. In other words, owners here occupy the same position as owners in severalty of different tracts or premises upon a mill stream, who are operating mills thereon, and it has been held that, in such case, the owners may maintain an action to restrain the improper diversion of water to the injury of their mills. "In such case, although the titles are different, yet the injury, being a common one, creates such a community of

interest as to entitle them to join in the action." (High on Injunctions, sec. 880).

*Second*—Appellants claim that the ditch or channel, constructed upon the north-west quarter of section 16 owned by appellants, was an artificial ditch, and that, therefore, appellants might fill it up without being liable to appellees. It appears that the father of appellant, Joseph Baumgartner, dug a ditch upon the north-west quarter of section 16 as far up as the highway. But it is admitted by the appellants in their answer, that there was a natural water-course through the land owned by them, and that the waters from the highway and from the lands owned by appellees, Cheasbros and Twombly, found their outlet through that water-course. If it be true that the father of appellant, Joseph Baumgartner, dug a channel as is claimed, the proof shows that it was done at a time far back in the past, and that appellants had acquiesced in the running of the waters through their lands for such a length of time, that the court was justified in finding that the channel through the land of appellants was a natural water-course, and was the outlet for the water from the highway and from the premises of appellees. In support of their contention upon this branch of the case, appellants refer to the case of *Weidekin v. Snelson*, 17 Ill. App. 461, but in that case there was no prescriptive right to the flow of water from the lands of the complainants over the lands of the defendants, nor any right by contract; and for this reason the case referred to is not in point. The appellant, Joseph Baumgartner, in his testimony says that the open ditch was there as long as he can remember, and that he is forty years old. At least four other witnesses swear that they have been acquainted in the neighborhood twenty or thirty years, and that the open water ditch has been in existence as long as they remember.

*Third*—It is claimed, on the part of appellants, that there was an agreement between appellees on the one

side, and the appellants on the other, that a tile ditch should be constructed for the purpose of draining their respective lands. There is some evidence, tending to show that tile was laid across the highway and across a part of the lands in question. But the weight of the evidence is not in favor of the contention of the appellants, that the tile thus laid was to be a substitute for the open water-course or channel, which had existed for so long a time. At any rate, the evidence is conflicting upon the question, whether the open water-course was to be filled up, and the tile was to be substituted for it. It is not claimed that there was any written agreement on this subject, and whether or not there was any oral agreement, to the effect that the open ditch or water course should be filled up, is a question upon which the witnesses of the appellees and those of the appellants differ. This being so, we are not inclined to disturb the finding of the chancellor. The trial court has an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, and, when such is the case, the findings of the trial court upon mere questions of fact, where the testimony is conflicting, will not ordinarily be disturbed on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence. (*Burgett v. Osborne*, 172 Ill. 227). Here, we are unable to say that the findings of the lower court are clearly and manifestly against the preponderance of the evidence upon this subject.

After a careful examination of the record, we find no good reason for holding, that the decree, entered by the trial court, is not correct and justified by the testimony.

Accordingly, the decree of the circuit court is affirmed.

*Decree affirmed.*

THE PEOPLE *ex rel.* Hillel Lodge No. 72, I. O. B. B.  
v.

JAMES A. ROSE, Secretary of State.

*Opinion filed February 17, 1904.*

1. CORPORATIONS—term “active business,” as used in the act requiring annual report, construed. The term “active business,” as used in sections 2 and 7 of the act of 1901, (Laws of 1901, p. 124,) requiring corporations to report annually to the Secretary of State, means the doing of those things which the corporation is authorized to do by its charter.

2. SAME—act of 1901, requiring annual report, applies to corporations not for pecuniary profit. The act of 1901, (Laws of 1901, p. 124,) requiring corporations to report annually to the Secretary of State, includes within its terms corporations not for pecuniary profit.

3. SAME—purpose of act requiring annual report. The purpose of the act of 1901, requiring corporations to report annually to the Secretary of State, is to secure evidence once a year that the corporation is exercising its powers, and the effect of a failure to make the report is to make a *prima facie* case of non-user.

4. SAME—failure to report under act of 1901 does not work an absolute forfeiture. The cancellation which the Secretary of State is required by the act of 1901 to enter upon his records in case of the failure of a corporation to make annual report, does not, of itself, work a forfeiture of the corporation's charter, but is simply *prima facie* evidence of non-user, which may be availed of by the People in a proceeding to forfeit the charter.

5. SAME—corporations organized under general law are subject to statutory regulation. Under section 9 of the general Incorporation act, corporations organized under the general law are subject to statutory regulation.

6. CONSTITUTIONAL LAW—act of 1901, requiring annual report, is constitutional. The act of 1901, (Laws of 1901, p. 124,) requiring corporations to report annually to the Secretary of State, is not unconstitutional, as authorizing absolute forfeiture of a charter by the Secretary of State, but is a valid exercise of legislative power to establish a new rule of evidence.

MAGRUDER, J., dissenting.

ORIGINAL petition for *mandamus*.

This is a petition for *mandamus*, filed in this court, at the October term, 1902, by Hillel Lodge No. 72, Independent Order Bnai Brith, in the name of the People of

the State of Illinois, against James A. Rose, Secretary of State of Illinois. The petition alleges that petitioner is a corporation not for pecuniary profit; that its charter issued on February 21, 1900, and was duly recorded in the recorder's office of Cook county, Illinois, on March 3, 1900; that petitioner is organized and existing under the laws of this State; that it complied with all the laws applicable to its incorporation and has ever since complied with the provisions of its charter and the laws of Illinois. It further alleges that respondent, as Secretary of State, has informed petitioner that its charter has been canceled and forfeited by him because of its failure to comply with the act of the legislature entitled "An act requiring corporations to make annual report to the Secretary of State, and providing for the cancellation of articles of incorporation for failure to do so, and to repeal a certain act therein named," approved May 10, 1901; that respondent claims the right to forfeit and cancel the charter because of the violation of section 2 of the act, and for failure to make a report and pay the fee mentioned in said section 2. The petition then alleges that respondent has informed petitioner that he will reinstate it upon his records upon payment of \$20 to him by it, and upon petitioner filing in his office an affidavit stating the facts required by section 2 of the act, and stating the further fact that petitioner was at the time of default, and still is, engaged in "active business" under its charter; and the petition then alleges that petitioner refuses to comply with sections 2 and 7 of said act because it is not engaged in "active business" and can not make affidavit to that fact, but is a non-profitable and *quasi*-charitable corporation. The petition avers that the act has no reference to corporations not for pecuniary profit, and also alleges that the act is unconstitutional. It sets out that the charters of twenty-five thousand corporations have been canceled by respondent, acting under said act, and that the petition is filed

on behalf of all of them; that respondent is still Secretary of State, and has it within his power to revoke the cancellation of petitioner's charter, but that he refuses so to do.

The prayer of the petition is that the court order and command said James A. Rose, as such Secretary of State, to cancel on his records the forfeiture and cancellation of petitioner's charter without the payment of \$20.

To the petition of the lodge, James A. Rose, Secretary of State, filed a general demurrer.

The questions presented for determination are: First, does the act apply to corporations not organized for pecuniary profit; second, is the act constitutional.

ADOLPH MOSES, for petitioner:

The General Assembly has no power to declare a forfeiture of a corporate franchise, nor to empower the Secretary of State to do so. Such an act is an exercise of judicial power. *People v. Mallary*, 195 Ill. 582; *Bruffett v. Railway Co.* 25 id. 353.

The petitioner has been deprived of the "due process of law" guaranteed by the State and national constitutions. Art. 2, par. 2, and 14th amendment to constitution; *Westervelt v. Gregg*, 12 N. Y. 209; *Campbell v. Campbell*, 63 Ill. 462; *Board of Education v. Bakewell*, 122 id. 348; *Shields v. Ohio*, 95 U. S. 25.

A single act of non-feasance cannot become a ground for forfeiture of a corporation. High on Ex. Legal Rem. sec. 648; *Commonwealth v. Bank*, 28 Pa. St. 383; *Railroad Co. v. People*, 67 Ill. 11; *State v. Company*, 120 Ind. 337.

A proceeding for the dissolution of a corporation, even by a court, must be based on legal notice. 5 Thompson on Corp. sec. 6700.

Corporations are "persons," within the meaning of the fourteenth amendment to the constitution of the United States. *Santa Clara Co. v. Railroad Co.* 118 U. S. 394; *Railway Co. v. Mackey*, 127 id. 205.

Forfeiture of property cannot be adjudged by legislative act. Cooley's Const. Lim. (6th ed.) 444; 12 Am. Digest, (Century ed.) 2422; *Poppen v. Holmes*, 44 Ill. 360; *Hall v. Marks*, 34 id. 358; *Mapes v. Scott*, 94 id. 379; *Wilman v. Bank*, 1 Gilm. 667; *People v. Trustees*, 111 Ill. 171; *Railway Co. v. Belleville*, 47 Ill. App. 388.

H. J. HAMLIN, Attorney General, for respondent.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The first and second sections of the statute under consideration are as follows:

"Sec. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every corporation hereafter organized under the laws of this State shall, before receiving a certificate of complete organization, file with the Secretary of State a statement setting forth the post-office address of its business office, giving street and number.

"Sec. 2. Every incorporated company, other than railroad, banking, building and loan and insurance companies, existing by virtue of any general or special law of this State, or hereafter organized by virtue of any law of this State, shall annually, between the first day of February and the first day of March, report to the Secretary of State the location of its principal office in this State, with town, street and number; the name of its officers, with their residence, stating the town, street and number, with the date of the expiration of their respective terms of office; whether or not the corporation is pursuing an active business under its charter and the kind of business engaged in, if any, which said report shall be made under the seal of the corporation and shall be signed and sworn to by the president, secretary or other officer of the corporation, and in case said corporation is in the hands of an assignee or receiver, then such report shall be signed and sworn to by such assignee or receiver, which said report, together with a fee of one

dollar for filing the same, shall be sent to the Secretary of State, in whose office it shall be filed. The Secretary of State shall in no case receive or file said report until said fee is paid, and a failure to make said report and pay said fee shall be *prima facie* evidence that said corporation is out of business, and shall work a forfeiture of the charter of such corporation. And it is hereby made the duty of the Secretary of State to enter upon the records of his office, as soon as practicable after default in making such report, the cancellation of the charters of all corporations failing to make said report at the time and in the manner herein provided."

Section 3 provides that the Secretary of State shall furnish blanks for making the report contemplated by section 2, to each corporation whose address is disclosed by the records of his office, with a notice stating the effect of a failure to make the report, and provides for notice by publication to corporations whose addresses are not so disclosed.

Sections 4 and 5 provide for proof of publication, and fix the rate of compensation for publication of such notice.

Section 6 provides for filing with the recorder of deeds in each county a list of the corporations complying with section 2 of the statute, together with the names and addresses of their principal officers and the location of the principal business office of the corporation in this State, and a list of those failing to comply with section 2 after having in one or more years made the report required by that section.

Section 7 is as follows: "It is further provided, that any corporation which is pursuing an active business under its charter, failing to make said report at the time provided by law may, at any time, within one year from such default, be re-instated upon the records in the office of the Secretary of State upon the payment of a fee in the sum of \$20 for such re-instatement and filing in said office an affidavit stating all the facts required in sec-

tion 3 (2) of this act, and in addition thereto, the fact that it was at the time of such default, and still is, engaged in active business under its charter."

The remaining sections provide for the payment of expenses of publication and repeal an earlier act.

The language of this act is broad enough to include corporations not for pecuniary profit. The first section applies to "every corporation." The second is in reference to "every incorporated company," other than railroad, banking, building and loan and insurance companies, now existing or hereafter organized under the laws of this State. It is conceded that these general terms include corporations of the class to which the petitioner belongs, but it is argued that they are restrained by the general context and by the spirit of the law, and that the act, when considered as a whole, indicates that the legislature meant only business corporations, and in support of this position, attention is called to the fact that in section 2 the corporation is required to report whether it "is pursuing an active business under its charter," and by section 7, when it desires re-instatement, it is required to show, by affidavit, that at the time of its default it was, and still is, "engaged in active business under its charter," and it is said that corporations not for pecuniary profit ordinarily are not engaged in active business, whence the conclusion that the act was not intended to apply to them. The term "active business," as used in this statute, means the exercise of corporate powers,—the doing of those things which the corporation is by its charter authorized to do. We are confirmed in this view of the meaning of these words by the fact that in section 29 of chapter 32, persons desiring to organize a corporation not for pecuniary profit are required to file with the Secretary of State a certificate stating "the particular business and objects for which it is formed," and by the succeeding section it is provided, "upon complying with the foregoing conditions, the corporation, society

or association shall be deemed fully organized, and may proceed to business." It is apparent that the word "business," as used by the legislature in the statute of 1901 under consideration, refers not alone to those things which the corporation for pecuniary profit may do.

The constitutionality of the act is attacked upon the ground that the legislature has no power to dissolve a corporation or to declare a forfeiture of its franchise, nor has the legislature the power to prescribe a state of facts under which this may be done through an administrative officer, because such an act is the exercise of judicial power, which, under the constitutions of the State and of the United States, is vested in the judicial and denied, by implication, to the legislative department, and as petitioner was organized prior to the passage of the act of 1901, we are cited to the *Dartmouth College case*, and to other cases of like character, holding that a franchise of a corporation is property in the law, and is protected by the constitutions of the State and of the United States as a contract, which cannot be impaired by the legislature. The accuracy of petitioner's propositions, as abstract statements of the law, is beyond question, but we think them inapplicable here because based upon a misconstruction of the statute now before us. One of the purposes of the present statute evidently was to facilitate the taxation of corporations, and to provide information for the taxing officers in reference to the existence and location of corporations organized under the laws of the State and owning property in the State. The purpose of this statute further is to require evidence once each year that the corporation is exercising the powers granted, and its failure to make such proof is made *prima facie* evidence of non-user. The thing that works a forfeiture of the corporation is the fact of non-user, which can be finally determined only by a court of competent jurisdiction; (*Bruffett v. Great Western Railroad Co.* 25 Ill. 310; *Baker v. Administrator of Backus*, 32 id. 79; *Board of*

*Education v. Bakewell*, 122 id. 339;) and the cancellation which the Secretary of State is required to enter upon the records of his office would, in such proceeding, make a *prima facie* case for the People. If the corporation is, in fact, engaged in active business and fails to make the report, it is not, by reason of that failure, deprived of its charter, but may, in a suit brought against it, show the fact and thereby defeat the proceeding. It is no doubt true, as suggested by petitioner, that if, with the records in the office of the Secretary of State in their present condition, petitioner desired a certified copy of the documents filed by its incorporators as a basis for its charter, such copy would show the cancellation contemplated by section 2 of the statute. This condition of affairs, and the fact that such entry on the record is a perpetual and continuing notice that its corporate powers are ended, misleading though such notice may be in some instances, are incentives of the most potent character for a compliance with section 2 of the act. The effect of the act is simply to make a failure to report, as required, *prima facie* evidence, and the clause providing that the failure to report and pay the fee therefor "shall be *prima facie* evidence that said corporation is out of business, and shall work a forfeiture of the charter of such corporation," was merely intended to be a statement of the effect of a condition, namely, non-user, of which condition the failure is made *prima facie* evidence.

It may be suggested that this construction of the statute places upon the corporation an additional burden,—one not contemplated by its charter, which is the contract between it and the State,—and that the statute is therefore obnoxious to the constitution for the reason that it impairs the obligation of a contract.

Petitioner is organized under the general Incorporation act, passed in 1872. Section 9 of that act provides: "The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may

deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: *And, provided, further*, that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation." (Hurd's Stat. 1901, chap. 32, p. 455.)

In *City of Danville v. Danville Water Co.* 178 Ill. 299, we considered this section 9, and said in reference thereto (p. 306): "By organizing under the general Incorporation act, the defendant in error agreed to submit itself to and to be bound by such regulations and provisions as the legislature should deem it advisable to make. \* \* \* The language of section 9 is different from and broader in its scope than the language contained in many charters which reserve to the State the power to repeal, alter, amend or modify the charter itself. We apprehend, therefore, that the decisions restricting the power of the State as to charters which are given subject to the right of the State to repeal, alter, amend or modify them do not apply to such broad language as is used in section 9. By the terms of section 9 it is something more than the mere right to change the charter of the corporation which is reserved to the legislature. The authority is thereby reserved to provide the regulations and provisions under which the corporation may proceed in the transaction of its business. We have held that the legislature may impose duties on corporations the same as on individuals, in the absence of special enactments. We have also held that the constitution of 1848 by implication reserved to the legislature the right to change or increase the liability of a shareholder in a corporation.—*Illinois Central Railroad Co. v. City of Bloomington*, 76 Ill. 447; *Weidenger v. Spruance*, 101 id. 278; *Diversey v. Smith*, 103 id. 378; *Arenz v. Weir*, 89 id. 25; *Butler v. Walker*, 80 id. 345."

We think it apparent from the language just quoted that this statute of 1901, as we construe it, is within the terms of section 9, *supra*, which must be deemed to be a

part of the charter of every corporation organized under the act of 1872, and that while it is true that neither the legislature nor a ministerial officer can declare a forfeiture, still it is within the power of the legislature, under section 9, *supra*, to require corporations to make the reports required by section 2 of the act of 1901, and to provide that a record of their default, made by a ministerial officer, shall be *prima facie* evidence of non-user, and to authorize, *prima facie*, a forfeiture of the charter.

It is true that this statute makes that, viz., failure to report, evidence of non-user which before the passage of the statute would not have been proof on that subject at all; but this is not a valid constitutional objection.

"No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the State for its citizens and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights or rights subsequently acquired. Changes in them may be made applicable to existing causes of action.—Cooley's Const. Lim. (6th ed.) p. 451; *Gage v. Caraher*, 125 Ill. 447." *Chicago, Burlington and Quincy Railroad Co. v. Jones*, 149 Ill. 361.

It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary. '8 Cyc. p. 820; *Corbin v. Hill*, 21 Iowa, 70; *White v. Flynn*, 23 Ind. 46; *United States v. Klein*, 13 Wall. 128; *Missouri, Kansas and Texas Railway Co. v. Simonson*, 64 Kan. 802.

To give to this statute the meaning contended for by petitioner is to say that the purpose of the legislature was to make the failure to report conclusive evidence that a forfeiture has taken place, although the statute expressly says it shall be *prima facie* evidence, merely. This construction of petitioner finds support, it is true, in the fact that the statute provides that the failure to report shall work a forfeiture of the charter, thereby at-

tempting to give to the evidence, which it says is *prima facie*, the effect of evidence that is conclusive. The provisions of this statute are in that respect inconsistent with each other, and the meaning of the act must be determined by the construction placed thereon by the courts. To say that it merely provides what shall be *prima facie* evidence of non-user and for recording that evidence, is to uphold it; to say that the act of the Secretary of State which it directs absolutely forfeits the charter of the defaulting corporation, is to destroy it.

Where a statute may receive either of two constructions, one of which would result in its being upheld and the other of which would bring it within the inhibition of the constitution, that construction will be adopted by the courts which will avoid conflict with the constitution. *Newland v. Marsh*, 19 Ill. 376; *People v. Simon*, 176 id. 165.

It becomes our duty, therefore, to construe this statute, not as a law authorizing the Secretary of State to declare absolute forfeitures of the charters of defaulting corporations, but as merely establishing a new rule of evidence against these artificial persons.

The corporation which has defaulted in making this report can, within a year thereafter, have affirmative relief and clear the records in the office of the Secretary of State of the evidence against it by complying with section 7 of the act of 1901. What its right, if any, is to affirmative relief after the expiration of that year if it does not avail itself of the right given by that section, it is unnecessary now to determine.

The facts averred by the petition do not entitle the petitioner to the relief sought.

*Writ denied.*

Mr. JUSTICE MAGRUDER, dissenting:

I do not concur in all of the opinion of the majority, as prepared by my brother SCOTT, and submit the following views:

*First*—In the petition for *mandamus* herein filed, the petitioner alleges that the act of March 10, 1901, when

properly construed, has no reference to corporations organized not for pecuniary profit, or to religious corporations. It is then alleged that the petitioning corporation herein is a corporation not for pecuniary profit, and, therefore, does not come within the purview and requirements of the act. This contention cannot be maintained. The act is broad enough in its terms to include all corporations, whether religious corporations, or corporations organized not for pecuniary profit, as well as corporations organized for pecuniary profit.

The first section of the act provides "that every corporation hereafter organized under the laws of this State shall \* \* \* file with the Secretary of State a statement," etc. This language is broad enough to embrace every corporation organized under the laws of the State, and makes no distinction between those organized for pecuniary profit, and those organized not for pecuniary profit.

Again, section 2 provides that "every incorporated company, other than railroad, banking, building and loan and insurance companies, existing by virtue of any general or special law of this State, or hereafter organized by virtue of any law of this State, shall annually \* \* \* report to the Secretary of State." The language of this section is broad enough to embrace corporations organized not for pecuniary profit, as well as corporations organized for pecuniary profit. Every corporation, except railroad, banking, building and loan and insurance companies, is embraced within the requirements of the act. Consequently, the petitioner could not escape obedience to the requirements of the act upon the alleged ground that it is a corporation organized not for pecuniary profit. By reason of its character in this regard it is not taken out of the terms of the act.

It seems to be contended that corporations, organized not for pecuniary profit, are not embraced within the terms of the act, because the report, mentioned in sec-

tion 2, is required to state "whether or not the corporation is pursuing an active business under its charter and the kind of business engaged in, if any;" and because, in section 2, "a failure to make said report and pay said fee shall be *prima facie* evidence that said corporation is out of business," etc.; and because in section 7 it is provided "that any corporation, which is pursuing an active business under its charter, failing to make said report at the time provided by law may, \* \* \* be re-instated," etc. It does not necessarily follow that the words, "active business" and "business," as here used, refer only to corporations organized for pecuniary profit. These words are not confined to corporations which do business for the purpose of making money, but refer to the carrying out of the objects of its charter by any corporation. When the corporation is required to report whether or not it is pursuing an active business under its charter, it is merely required to report whether or not it is a going concern, or is doing such acts as it is authorized to do, and for the doing which it was clothed with corporate existence. For instance, the petitioner alleges that its corporate object, as shown by its charter, is, among other things, "to alleviate the wants of the poor and needy; to visit and attend the sick; to rescue the victims of persecution; to provide for, protect and assist the widow and orphan," etc. The accomplishment of these ends, though they may be ends proposed to be accomplished by a corporation organized not for pecuniary profit, may require the employment of agents and the distribution and delivery of supplies. The carrying out of the charitable objects proposed by the charter might require the employment of such means and agencies as would constitute a business, though not a business pursued for pecuniary profit, and pursued only for the purpose of accomplishing such charitable ends. It cannot be said, therefore, that the broad language, used in section 1 and section 2 of the act, is so far limited and restricted by the subse-

quent use of the words, "active business," and "business," as to eliminate altogether from the purview of the act such corporations, like the petitioner, as are organized not for pecuniary profit.

Judicial notice is taken of the fact that section 2 of the act of March 10, 1901, was amended by an act approved May 13, 1903. (Sess. Laws of Ill. 1903, p. 123). By the latter act section 2 was amended by inserting after the words "insurance companies," the following words: "religious corporations and corporations not organized for pecuniary profit." Section 2, as thus amended, reads as follows: "Every incorporated company other than railroad, banking, building and loan and insurance companies, religious corporations and corporations not organized for pecuniary profit, existing by virtue of any general or special law of this State, or hereafter organized by virtue of any law of this State, shall annually, between the first day of February and the first day of March, report to the Secretary of State," etc. In other words, the amendment to section 2, takes religious corporations and corporations not organized for pecuniary profit, as well as railroad, banking, building and loan and insurance companies, out of the operation of the act of 1901. This amended act, however, has no effect upon the present suit, and does not bring it within the doctrine announced in the case of *Vance v. Rankin*, 194 Ill. 625, for the reason that the forfeiture and cancellation hereinbefore set forth were complete before the passage of the amended act; and the time has passed when, by the provisions of the act of 1901, the petitioning corporation can be re-instated. This being so, if the act of 1901 is a valid act, the forfeiture and cancellation complained of by the petitioner must stand. The act of 1901, before it was amended, and as amended, is not an act which gives a special remedy, but is an act which imposes a penalty. The penalty, having been incurred under the act of 1901 before amendment, cannot be remitted by the amendment

to the act passed in 1903. That amendment, by its terms, refers to future and not past action, as clearly appears from the words "every incorporated company, \* \* \* shall annually \* \* \* report to the Secretary of State," etc. The report to be made refers to future reports, that is to say, all reports made after the passage of the amendment in 1903. Whether or not, therefore, the petitioner is entitled to the writ of *mandamus* prayed for, depends upon the question whether the act of 1901 is a constitutional law.

*Second*—The petition further alleges that, even if the act of March 10, 1901, does include corporations organized not for pecuniary profit, yet that "it is unconstitutional and void, and is no warrant in law for the Secretary of State to cancel and forfeit petitioner's charter, or to demand money for its re-instatement." This allegation of the petition presents for consideration the constitutionality of the act of May 10, 1901. And the observations hereinafter made apply as well to the act as amended in 1903, as to the original act of 1901, that is to say, as well to the act since religious corporations and corporations not organized for pecuniary profit have been excluded from its operation as when they were included.

By the act in question the legislature requires every corporation in the State, with the exceptions specified, to make a report annually to the Secretary of State, and to pay to him a fee of one dollar, and makes the failure to make such report, and pay such fee, operate as a forfeiture of the charter of the corporation; and the Secretary of State is required, upon default by the corporation in making such report, to enter upon the records of his office the cancellation of the charter of the corporation so making such default.

Has the legislature the power to forfeit the charter of a corporation for failure to perform a specified act without any ascertainment of such failure by a judicial proceeding?

The charter of a corporation is an executed contract between the government and the corporators. (*Dartmouth College v. Woodward*, 4 Wheat. 518; *Coles v. Madison County*, Breese, 154; *Bush v. Shipman*, 4 Scam. 186). The legislature has no power to repeal, impair or alter such a contract against the consent of the corporation. (*Bruffett v. Great Western Railroad Co.* 25 Ill. 310). The first clause of section 10 of article 1 of the constitution of the United States provides that "no State shall \* \* \* pass any \* \* \* law impairing the obligation of contracts." Section 14 of article 2 of the constitution of 1870 of Illinois provides that "no \* \* \* law impairing the obligation of contracts \* \* \* shall be passed."

A law which, like the one here under consideration, authorizes such a ministerial officer as the Secretary of State to enter upon the records of his office the cancellation of the charter of a corporation, without a judicial determination that such corporation has been guilty of some act, which authorizes a forfeiture of its charter, impairs the obligation of the contract between the State and the corporation, as embodied in its charter. (*Bruffett v. Great Western Railroad Co.* 25 Ill. 310).

If, however, there could be any question as to the correctness of the proposition already stated, there can be no question as to the unconstitutionality of this act, for another reason. The fourteenth amendment to the constitution of the United States provides, among other things, as follows: "Nor shall any State deprive any person of life, liberty, or property without due process of law." Section 2 of article 2 of the constitution of 1870 of Illinois provides as follows: "No person shall be deprived of life, liberty, or property without due process of law." The franchises, granted to a corporation by the act of incorporation, are property. (*Regents v. Williams*, 9 Gill & Johns. 365; 31 Am. Dec. 97). Such franchises being property, they cannot be taken away from the corpo-

ration without due process of law. What is due process of law? The expression, "due process of law," means the same as the expression, "the law of the land." (Cooley's Const. Lim.—6th ed.—p. 430; *Burdick v. People*, 149 Ill. 600). "The law of the land" has been defined to be "the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything, which may pass under the form of an enactment, is not, therefore, to be considered the law of the land." (Cooley's Const. Lim.—6th ed.—p. 431).

In *Regents v. Williams*, 31 Am. Dec. 99, it was said: "By 'the law of the land' is meant, by the due course and process of the law."

In *Campbell v. Campbell*, 63 Ill. 462, we held that the words, "due process of law," in the clause of the constitution forbidding divestiture of title except by due process of law, "has reference to judicial proceedings according to the course and usage of the common law, and must always be based upon notice."

In *Board of Education v. Bakewell*, 122 Ill. 339, we quoted and adopted the definition of due process of law, as given by Mr. Justice Edwards in *Westervelt v. Gregg*, 12 N. Y. 209, which definition is as follows: "Due process of law undoubtedly means, in the due course of legal proceedings according to those rules and forms, which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass, is, in no sense, the process of law designated by the constitution." In the case of *Board of Education v. Bakewell*, *supra*, we said (p. 350): "To ascertain that a deed is conditional, that there has been a breach of condition, and to enforce forfeiture for the breach, are judicial functions, which it is not within the competency of legislative power to exercise. \* \* \*

A private corporation, created by the legislature, may lose its franchises by a mis-user or a non-user of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce a forfeiture.—*Terrett v. Taylor*, 9 Cranch, 51." In *Burdick v. People*, 149 Ill. 600, we said (p. 605): "The phrase, 'due process of law,' is the equivalent of the words, 'law of the land,' as used in Magna Charta, and means, 'in the due course of legal proceedings according to those rules and forms, which have been established for the protection of private rights.' (*Board of Education v. Bakewell*, 122 Ill. 339; *Rhinehart v. Schuyler*, 2 Gilm. 473; *Davidson v. New Orleans*, 96 U. S. 97; Cooley's Const. Lim.—5th ed.—marg. p. 356, top p. 435). An act of the legislature is not necessarily the 'law of the land.' A State cannot make anything 'due process of law' which, by its own legislation, it declares to be such. An act of the legislature, which transfers the property of one man to another without his consent, is not a constitutional exercise of legislative power, because, if effectual, it operates to deprive a man of his property without 'due process of law.'—*Davidson v. New Orleans*, *supra*; *Taylor v. Porter*, 4 Hill, 140; *Rohn v. Harris*, 130 Ill. 525; *Ervine's Appeal*, 16 Pa. St. 256; *Hoke v. Henderson*, 4 Dev. 1."

Inasmuch as "due process of law," or "the law of the land," are expressions, which have reference to judicial proceedings according to the course and usage of the common law, then an act of the legislature, which deprives a person or a corporation of property without providing for any judicial proceeding, is a violation of the constitution, because it is an attempt to confer judicial power upon the legislature.

Article 3 of the constitution of 1870 is as follows: "The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power

properly belonging to either of the others, except as hereinafter expressly directed or permitted." Section 1 of article 6 of the constitution of 1870 provides that "the judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns."

In *Bruffett v. Great Western Railroad Co.* 25 Ill. 310, where this court had under consideration an act of the legislature, whose design appears to have been to repeal the charter of a railroad company, and to confer its property rights and franchises upon a different body of incorporators, we said (p. 312): "If, however, this act might be regarded as an effort to declare a forfeiture of the chartered rights of the company, then in existence, it is urged that it would violate the second article of our State constitution. The second section of that article divides the powers of government, and confers them upon three distinct bodies of magistracy; the legislative, the executive and the judiciary. The second section expressly prohibits any person, or collection of persons, being one of these departments, from exercising any power properly belonging to either of the others, and it declares all acts in violation of that section void. \* \* \* We are informed by Mr. Justice Blackstone, in his Commentaries, that, amongst the different modes by which a corporation may be dissolved, is that of a forfeiture of its charter by negligence or abuse of its franchises. In such a case, the law judges that it has broken the condition, upon which it was incorporated, and thereupon it has become void. He also informs us that the regular course in such a case, to deprive the body of its powers, is to bring an information in the nature of a *quo warranto*, to inquire by what warrant its members exercise their corporate powers, having forfeited the charter by the acts complained of in the information. Another mode of

judicial proceeding is by *scire facias*, which, under some circumstances, is the appropriate remedy to have the forfeiture ascertained and declared. These are the remedies in Great Britain, notwithstanding the parliament in theory possesses the same power to declare a forfeiture as the courts. Chancellor Kent, in his Commentaries, (vol. 2, p. 305,) lays down the doctrine, that the legislature cannot repeal, impair or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation judicially ascertained and declared. \* \* \* It is not doubted that the legislature is prohibited, by the constitution, from exercising the power of judicially determining and declaring that a contract is forfeited, between individuals. And no reason can be perceived, why it should be exercised, when the State itself is a party to the agreement. The power, in either case, is by the constitution devolved upon the courts, and is consequently prohibited to the legislative department. It then follows that this act, so far as it may have been designed to declare a forfeiture of the charter of the Great Western Railroad Company, and to dissolve that body, is prohibited by the constitution, and is inoperative and void." So, here, the act of May 10, 1901,—inasmuch as it makes the failure to file a report and pay a fee of one dollar *prima facie* evidence that the corporation is out of business, and makes such failure operate as a forfeiture of the charter of the corporation, and furthermore makes it the duty of the Secretary of State, a mere ministerial officer, to enter upon the records of his office, as soon as practicable after default in making such report, the cancellation of the charters of all corporations, failing to make such report at the time and in the manner therein provided—is in contravention of the constitution, and is inoperative and void.

In *Regents v. Williams*, *supra*, the court had under consideration an act of the legislature, which professed to

discontinue and abolish the corporation of the regents of a university, and to appoint a board of trustees, composed of different persons, under the corporate name of the trustees of the University of Maryland, and to transfer to the new corporation, thus attempted to be created, all the franchises and property of the corporation intended to be abolished; and it was held that this act, "if effectual, would amount to a legislative ouster; a legislative judgment of dissolution; an exercise of judicial power not warranted by the constitution; a sentence of ouster or of dissolution, being strictly a judicial act, for some imputed delinquency ascertained on proceedings at law instituted for that purpose, which, though assuming the garb of a law, the legislature, not being invested with a judicial power, is not competent to pass without the consent of the corporation." In the case of *Regents v. Williams, supra*, it was also said: "It cannot be denied that the franchises granted by the act of incorporation are vested rights, and can they be taken from the regents by any act of the legislature without impairing the obligation of the contract, that they shall be possessed and enjoyed by them and their successors in their corporate character? It is very clear that they cannot, and that no act of the legislature of the State can effect that object without the assent of the corporation, if the prohibitory clause of the tenth section of the first article of the constitution of the United States is applicable to such a contract as this; and no reason is perceived why it should not be held to apply as well to such contract as to any others, considering and treating this as a private corporation. \* \* \* The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; they are alike beyond the reach of legislative power here, and the high prerogative power of the crown of England, which may create, but cannot at pleasure dissolve a corporation, or without its consent alter or amend

its charter. \* \* \* To say that the legislature possesses the power to pass capriciously or at pleasure a valid act, taking from one his property and giving it to another, would be in this age, and in this State, a startling proposition, to which the assent of none could be yielded; and yet there is nothing to forbid it, if it is once conceded that they have power to dissolve one corporation, and take from it its franchises and property, without its consent, and transfer them to another. \* \* \* The legislature, executive and judiciary, are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned to it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective spheres of action."

It cannot be said that the legislature would not have power to require any corporation, created under the laws of Illinois, to make such report as is required by this act. In default of making such a report it might impose a fine, and authorize the proper officers of the government to institute a judicial proceeding in consequence of the violation of the statute. But to hold that the legislature has the power to cancel the charter of the corporation, and take away its corporate franchises, without a judicial investigation of the question whether the corporation has been guilty of any act to justify a forfeiture of its charter, would be to clothe the legislature with the power, not only to impair the obligation of a contract, but also to deprive the corporation of its property without due process of law, and to confer upon the legislature the power to exercise judicial functions.

Judge Cooley in his work on Constitutional Limitations, (6th ed. p. 443) says: "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away. And every man is entitled

to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it. Nor can a party, by his misconduct, so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law." In the case at bar, the petitioner herein failed to make the report, and pay the fee, required by section 2 of the act of May 10, 1901. If this failure be regarded as "misconduct," it could not so far forfeit the right of the petitioner to be a corporation, that that right could be taken from it without judicial proceedings, declaring the forfeiture in due form. The legislature cannot declare a forfeiture of property by an act of its own, and, if this is so, it cannot confer the power to declare such forfeiture upon a ministerial officer, like the Secretary of State. All the authorities and text books, to which the briefs refer, announce this doctrine.

"The charter of a corporation cannot be forfeited for mis-use or abuse of charter powers, except by direct judicial proceedings." (12 Am. Dig.—Cent. ed.—p. 2422, and cases there cited).

Undoubtedly, under section 9 of the Illinois Corporation act, the General Assembly has power "to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act," etc. (1 Starr & Curt. Ann. Stat.—2d ed.—p. 1006). But the power to prescribe regulations and provisions, which shall be binding upon a corporation, does not include the power to repeal its charter without a judicial proceeding; nor does that section of the act in regard to corporations confer any authority upon the

Secretary of State, under a state of facts created by the General Assembly, to cancel and forfeit the charters of corporations.

In Thompson's Commentaries on the Law of Corporations (vol. 5, sec. 6584) the doctrine is thus clearly announced: "Except where the power to repeal the charter of a corporation, or to revoke the franchises which it has conferred upon the co-adventurers, is expressly reserved, as already stated, it is not, in general, competent for the legislature of a State to dissolve a corporation, or to declare a forfeiture of any of its franchises. The reason is, that such an act is an exercise of judicial power, which, by all American constitutions, is vested in a separate body; which, consequently, is denied by implication to the legislature; and which, in some States, is denied to it in express terms. The franchises of a corporation are property; and, in view of this fact, there is no room for doubt upon the proposition, that an act of the legislature annulling the franchises of a corporation, where the power to do so has not been reserved so as to become a part of the contract embodied in the grant itself, would be a deprivation of property without due process of law; within the inhibition of the fourteenth amendment to the constitution of the United States." (Ibid. secs. 6608, 6700; *People v. Mallary*, 195 Ill. 582).

For the reasons above stated, it seems to me that the act of May 10, 1901, is unconstitutional.

Complaint is made that *mandamus* is not the proper remedy to secure the relief here sought. No objection is made as to the form of the present proceeding, nor as to the tribunal in which it has been begun. The reports are full of cases, where the question of the constitutionality of an act of the legislature has been determined in a proceeding by *mandamus*. (High on Ex. Legal Rem.—3d ed.—sec. 124a; *Giddings v. Blacker*, 93 Mich. 1; *People v. Thompson*, 155 Ill. 451; *People v. Hutchinson*, 172 id. 486; *Marbury v. Madison*, 1 Cranch, 149; *Ex parte Robinson*, 86

U. S. 505; *People v. Rose*, 167 Ill. 147; *People v. VanCleave*, 187 id. 125; *People v. VanCleave*, 183 id. 330).

Counsel for the respondent says that the legality, or rather the existence of a corporation, cannot be questioned in *mandamus*, but must be raised and determined by a direct proceeding in the nature of a *quo warranto* or a *scire facias*. The object here is not to determine the legality or the existence of a corporation. It is not denied that the petitioner herein was properly organized as a corporation. The question here is whether, under an act of the legislature, the Secretary of State has the power to cancel the charter of a corporation, already existing and legally organized. When a corporation is organized under the Corporation act of this State, the statement, which announces the purposes of the organization, is filed with the Secretary of State. The license to the commissioners to open books for subscription is issued by the Secretary of State. The report of the commissioners is filed in the office of the Secretary of State. The certificate of organization of the corporation is issued by the Secretary of State. This act itself, in section 7, authorizes the Secretary of State to re-instate a corporation, which has failed to make the report required by section 2, upon the records of his office upon the payment of a fee in the sum of \$20.00 for such re-instatement and filing an affidavit, etc. The prayer of the petition for *mandamus* in this case is substantially a prayer, that the petitioning corporation be re-instated by the Secretary of State without the payment of the fee of \$20.00. Involved in the re-instatement of the corporation necessarily is the cancellation of the forfeiture which has been placed upon the records. There can, therefore, be no objection to the prayer of the petition, which asks that the cancellation, which has been made under the provisions of section 2 be removed, or in other words, that the corporation be re-instated upon the records of the Secretary of State. (2 Spelling on Ext. Rem. sec. 1455, *et seq.*; *Ellis*

v. *County Comrs.* 2 Gray, 370; *People v. Matteson*, 17 Ill. 167; *People v. Brinkerhoff*, 68 N. Y. 259; *In re Bradley*, 7 Wall. 364).

I think that the writ of *mandamus* should be awarded in accordance with the prayer of the petition.

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HENRY H. GAGE

v.

THE PEOPLE *ex rel.* John J. Hanberg, County Collector.

*Opinion filed February 17, 1904.*

1. JUDGMENTS AND DECREES—*when copy of notice cannot be received to overcome recitals of judgment.* An uncertified paper, which must be shown by parol to be a copy of the original notice of re-docketing of a case, cannot be received in evidence to overcome the recitals of the order of court re-docketing the cause, wherein it is found that due notice had been given.

2. SPECIAL ASSESSMENTS—*when ordinance is not void.* The amendment to the Improvement act prohibiting the inclusion of the cost of making and levying the assessment in the assessment roll does not render void an ordinance previously passed which includes such items, but invalidates that part of the ordinance only, and the court, upon reversal for that reason, may eliminate costs and recast the roll without requiring a new ordinance.

3. SAME—*objection that itemized estimate was not included in resolution cannot be made on application for sale.* An objection that the engineer's itemized estimate of cost was not included in the record of the improvement board's first resolution for the improvement cannot be urged on application for judgment of sale.

4. SAME—*when reduction of the assessment is not ground for objection.* Reduction of the original assessment by consent of the petitioner and the property owners affected is not ground for objection upon application for judgment of sale, where no collusion or resulting injury to the objector is shown.

5. SAME—*judgment on application for sale should conform to statute.* A judgment of sale for a delinquent special assessment should follow the statute as nearly as may be, applying its terms to a special assessment instead of general taxes; and where a failure to observe the statute is the only error, the cause will be remanded, with directions to enter a proper judgment.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

This is an appeal from the county court of Cook county, wherein a judgment and order of sale on delinquent city special warrant No. 30,512, for the first installment for a sewer in West Madison street, in the city of Chicago, was had upon the application of the county collector of said county. An appeal from the county court of Cook county was previously prosecuted to this court from the judgment of confirmation of the special assessment for said improvement, and such judgment of confirmation was reversed upon the ground that the costs of making and collecting the assessment were included in the special assessment, contrary to the provisions of the amendatory act of May 9, 1901. The opinion reversing the judgment of the county court was filed February 21, 1902, and the petition for rehearing was denied April 5, 1902. *Gage v. City of Chicago*, 195 Ill. 490.

Upon the application for judgment and order of sale for the delinquent assessment appellant filed objections that the lower court was without jurisdiction, either of the person or subject matter, to enter judgment of confirmation, upon the grounds, first, that this court had reversed said cause because of an invalid estimate of the costs included in the ordinance, and the county court could not correct such error by a reduction of the assessment roll or otherwise; second, that on remandment said cause was re-docketed without the statutory notice; third, that the ordinance, including the estimate of costs, was void and the judgment of confirmation entered thereon was void; fourth, that no itemized estimate of the cost of the improvement was made a part of the record of the first resolution of the board of local improvements; fifth, that after the entry of judgment of confirmation in the original proceeding the lower court vacated the judgment entered against certain other objectors, on motion of the city, and voluntarily reduced the amount of the assessment of said last mentioned objectors twenty per cent without authority of law and to the prejudice

of this objector; sixth, the judgment does not conform to the requirements of the statute.

F. W. BECKER, for appellant.

ROBERT REDFIELD, and WILLIAM M. PINDELL, (EDGAR B. TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

*First*—As to the first contention of appellant, that the county court could not eliminate from the assessment roll the costs of making and collecting the assessment, but that a new ordinance would be required in such case, it need now only be said that the question here raised was fully considered by this court in the case of *McChesney v. City of Chicago*, 205 Ill. 528, and decided adversely to appellant's contention.

*Second*—It is next urged that the cause was re-docketed, in compliance with the remanding order of this court, without the notice required by section 83 of the Practice act, which provides that upon a transcript of the order remanding the cause being filed, "and not less than ten days' notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be re-instated therein."

The record shows that a transcript of the order of this court remanding said cause was filed in the court below on the 20th day of April, 1902, and that on the 13th day of May, 1902, the cause was re-docketed, and the order of court re-docketing the same contained the recital, "and it appearing to the court that due notice, in accordance with the law, has been given to all parties concerned in relation to said notice, and the court being fully advised in the premises, it is ordered that the said cause be and the same is hereby re-docketed and the cause set down at the foot of the calendar, being No. 91, which is set for trial Tuesday, May 20, 1902." Appellant does not deny that he received ten days' notice of

the application to re-docket the cause, but contends that the notice was insufficient and void because it failed to state that appellee had filed, or that there had been filed in said county court, the mandate of the court remanding said cause. The original notice was not in the files and could not be found, and appellant asked leave to, or made a motion to be allowed to, supply the lost notice by placing on the files a notice in proper form, but omitting any mention of the filing of the mandate, with a supposed acknowledgment of service by appellant, as of the second day of May, 1902, and called to the witness stand Robert Redfield, attorney for the collector, and he having been sworn, testified that he did not know anything about the original notice; that he did not remember when he saw it, and his mind was blank in reference to its contents. The copy of the notice was offered in evidence and objected to and the objection sustained. Appellant then offered the various orders of the court, including the order re-docketing the cause, the order of confirmation, showing that appellant was defaulted, and other orders entered in the cause, which were also objected to and excluded by the court.

The objection here urged is a collateral attack upon a judgment which recites proper service and the recitals of which import a verity. (*Glover v. People*, 188 Ill. 576; *Barnett v. Wolf*, 70 id. 76; *Young v. People*, 171 id. 299; *Perisho v. People*, 185 id. 334.) In such cases the alleged errors can only be corrected when they relate to errors and mistakes of the officer of the court, such as mistakes in the dates of the summons, or other like errors, or a mistake such as arises from defects or mistakes in the return of the officer, and in such cases the court can only take cognizance of such alleged errors when they appear from the record itself or the files which constitute a part thereof. (*Coughran v. Gutcheus*, 18 Ill. 390; *Barnett v. Wolf*, *supra*.) And where the defect appears upon the summons or other process it cannot be aided by parol evi-

dence. (*Barnett v. Wolf, supra.*) In the case at bar it is proposed, by parol evidence, to show that the original notice on file in the case is lost, and, likewise by parol evidence, to show that a certain writing offered in evidence is a copy of such original notice, and upon that to overcome the recitals of the judgment and avoid the same. If the rule that recitals of the judgment cannot be overcome by parol evidence is sound, then it must necessarily follow that to attack a judgment on the basis of an uncertified paper that must by parol evidence be shown to be a copy of an original paper which has been lost from the files, is also inadmissible, as it is but doing by indirection what is agreed by all the authorities can not be done directly. While it is true that ordinarily courts will, and should, permit the restoration of a record or any paper pertaining thereto, yet such application is addressed to the sound legal discretion of the court, and unless there has been an abuse of that discretion, error predicated upon the refusal of the court so to do will not be sustained.

*Third*—The ordinance in question was not void. It was a valid ordinance when passed, and the amendment to the law only affected so much of it as related to the costs for making the assessment and collecting the same. *McChesney v. City of Chicago, supra; Gage v. City of Chicago*, 195 Ill. 490.

*Fourth*—The objection that an itemized estimate of the costs of the improvement, as made by the engineer, was not included in the first resolution of the board of public improvements cannot be urged upon this application for sale, as such objection could properly have been urged in the proceeding for confirmation, and not having been there urged it now comes too late. *Steenberg v. People*, 164 id. 478; *People v. Talmadge*, 194 id. 67; *Walker v. People*, 170 id. 410.

*Fifth*—From the original judgment of confirmation, owners of property assessed \$25,000 for the improvement

in question prayed and perfected an appeal. The estimated cost of the entire improvement was \$75,000. On September 23, 1901, the objectors who had thus perfected their appeal, and the city, by its counsel, appeared in court and had said cause re-docketed, and it was there represented to the court, by agreement of the parties, that on account of the number of questions of law and fact presented by said appeal the result was doubtful; that the construction of said sewer was of great public necessity for considerations of public health and the development of the district for residence purposes; that the objectors desired that the improvement be made, and were willing to withdraw their appeal if the assessment should be reduced twenty per cent; that the objectors and the city regarded such settlement as proper and desirable. The court, reciting the foregoing matters at considerable length, thereupon set aside the original confirmation and by consent of the parties heard the cause, without a jury, as to the question of benefits, upon oral and documentary evidence, and that in view of the situation and location of the lands of the objectors there were strong and equitable reasons why the said assessment should be reduced, and it accordingly reduced the assessment of such objectors twenty per cent and confirmed the same for eighty per cent thereof. The record of this proceeding was offered in evidence in the application for judgment and order of sale at bar, and also the resolution entered at the public hearing before the board of public improvements, wherein the estimate of the cost of the improvement was fixed at \$75,000, and the original order of confirmation as to the lands of the objectors representing the \$25,000 of assessments. This evidence was objected to by appellee as immaterial and the objection was sustained, and it is now urged that the court below erred in refusing to admit this evidence, and if it was admitted it would have shown that appellant was prejudiced by such proceedings. We think not. The

case of *Culver v. City of Chicago*, 171 Ill. 399, is relied upon by appellant, and, as we view the case, refutes, instead of supports, his position. That case was an appeal from the judgment of confirmation, wherein a portion of the property therein that had been assessed was entirely released and discharged from the assessment. The release was by agreement between the city and the objectors. We there said (p. 404): "Under paragraph 147 of the City and Village act (Rev. Stat. p. 236,) the court is authorized, at any time before final judgment, to modify, alter, change, annul or confirm any assessment, or cause the same to be re-cast by the same commissioners, whenever it shall be necessary for the attainment of justice. It cannot be doubted that the court, under this statute, upon a proper showing, had ample power to set aside the assessment as to the property of the West Side Elevated Railroad Company. \* \* \* But it is said the court was not empowered to set aside the assessment by agreement. If the petitioner became satisfied that the railroad property was not benefited by the improvement and that the assessment was unjustly spread upon its property, we see no reason why petitioner might not confess the fact in court, and thus save the cost and expense of a trial which would in the end result in setting aside the assessment. The mere fact, therefore, that the assessment was set aside by agreement, if the property was not benefited by the assessment, could not be relied upon by the appellants as a defense. Before they could properly object to the action of the court it was incumbent on them to prove, or offer to prove, that they were in some way injured. This they failed to do." The appeal in the *Culver case* was from the confirmation of the assessment and was a direct attack upon the action of the court, and it is there very clearly held that the objection could not be sustained without showing that there was collusion between the petitioner and the objector, and in conse-

quence of setting aside the assessment the appellant, Culver, was injured.

The case of *Walker v. People*, 170 Ill. 410, was, like the case at bar, an appeal from a judgment and order of sale. It was there urged, upon objection, that ninety-five lots included in the assessment district, and which had been assessed for benefits, were, upon the hearing of confirmation, dismissed from the petition by the city. After referring to the authority of the court under paragraph 147 of the Local Improvement act, we said (p. 416): "If appellants' property was assessed more than it will be benefited or more or less than its proportionate share of the cost of the improvement, the proper place to raise that question and obtain the proper relief was in the county court, on the application to confirm the assessment. So, also, if the dismissal of the petition as to ninety-five lots which had been assessed by the commissioners resulted in making appellants' assessment greater than their proportionate share of the cost of the improvement, the proper place to obtain relief was in the county court or by an appeal from the judgment of confirmation, but no relief can be obtained on the application for judgment against appellants' lands."

We think the evidence offered under this objection was properly excluded.

*Sixth*—It is urged that the judgment is not in proper form and does not contain the elements as prescribed by the statute. We have examined the same and find it subject to the objection made. The judgment should follow the statute as nearly as may be, applying the same to a special assessment instead of general taxes.

The judgment of the county court will be reversed for this error and the cause remanded, with direction to that court to enter a proper judgment conforming to the provisions of section 191 of chapter 120 of Hurd's Statutes of 1899.

*Reversed and remanded, with directions.*

JOSEPH H. STRONG, Public Admr.

v.

PETER A. DIGNAN, Admr.

207	885
215	885

*Opinion filed February 17, 1904.*

1. **CONSTITUTIONAL LAW**—*appointment of administrator constitutes a part of the practice of courts of justice.* The appointment of an administrator and the manner of his selection constitute a part of the practice of courts of justice, within the meaning of the provisions of the constitution prohibiting special legislation regulating the practice in courts of justice or relating to courts.

2. **SAME**—*part of section 18 of the Administration act is invalid.* That part of section 18 of the Administration act, (Laws of 1897, p. 1,) requiring the appointment of the public administrator in counties of over two hundred thousand inhabitants where the intestate is a non-resident or has no widow, next of kin or creditors in this State, is special legislation, and as such is unconstitutional.

3. **SAME**—*what essential to validity of classification of counties by population.* Classification of counties by population, as a basis for legislation, is valid, provided the legislation is uniform and general and there is some reasonable relation between the situation of the counties classified and the purposes of the law.

4. **SAME**—*that part of section 18 of Administration act referring to the nomination of administrator is valid.* That part of section 18 of the Administration act, (Laws of 1897, p. 1,) which authorizes the next of kin, in certain cases, to nominate a competent person to act as administrator, is valid, although that part of said section authorizing appointment of the public administrator is void.

5. **EXECUTORS AND ADMINISTRATORS**—*right of a non-resident widow or next of kin to nominate administrator.* Under section 18 of the Administration act, as amended in 1897, (Laws of 1897, p. 1,) the widow or next of kin, even though non-residents, may nominate to the court some competent person to act as administrator.

WILKIN, J., dissenting.

**APPEAL** from the Probate Court of Cook county; the Hon. C. S. CUTTING, Judge; presiding.

This is an appeal from an order, entered by the probate court of Cook county on May 26, 1903, revoking the letters of administration issued to Joseph H. Strong of Cook county upon the estate of Jeremiah Ahearn, de-

ceased, and granting letters of administration *de bonis non* to Peter A. Dignan, on the petition of Mary Lavis, a resident of Massachusetts.

Jeremiah Ahearn died intestate in Chicago on March 15, 1903, without a widow, next of kin or creditors in this State, possessed of no real estate but of certain personal property, the amount of which is in dispute. He left him surviving, as his only heirs-at-law, Mary Lavis, a sister, and Morris Ahearn, a brother, both residing in the State of Massachusetts. On March 17, 1903, letters of administration were issued by the probate court of Cook county to Joseph H. Strong, public administrator of that county, on his petition therefor on his official bond, and in his official capacity.

On May 13, 1903, within sixty days after the death of the decedent, Jeremiah Ahearn, Mary Lavis filed her petition in said court, asking that the letters of administration theretofore issued to Joseph H. Strong be revoked, and that Peter A. Dignan, a resident of Chicago, in Cook county, be appointed administrator *de bonis non* by said court. An order was entered in accordance with the prayer of the petition on May 26, 1903, as above stated, in which order, removing appellant, the public administrator, and appointing appellee as administrator, the court found that no claims had been filed against the estate; that no order of adjudication had been entered; that Mary Lavis was entitled to select a suitable person to act as administrator; that appellee was a suitable person duly qualified under the laws of Illinois to so act; and in said order it is expressly found by the probate court, as a reason for its action, that that portion of section 18 of chapter 3 of the Revised Statutes of the State of Illinois, relating to the administration of estates hereinafter set forth, was unconstitutional and void, to-wit: "In all cases where the intestate is a non-resident, and in all cases where the intestate is without a widow, next of kin or creditors in this State, but leaves property

within the State, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over."

BURRAS & MCKENZIE, for appellant.

JOHN S. HUEY, for appellee.

MR. JUSTICE MAGRUDER delivered the opinion of the court:

Two questions are presented by this record: *First*, is that portion of section 18 of the Administration act of this State, which is set forth in the statement, preceding this opinion, constitutional? and, *second*, did Mary Lavis, sister of the deceased intestate, being a resident of Massachusetts, have the right, under the provisions of said section, to nominate a competent person to act as administrator of the estate?

Section 18 of chapter 3 of the Revised Statutes, entitled "An act in regard to the administration of estates," as amended in 1897, is as follows: "Administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to the intestate, or some of them, if they will accept the same, or the court may grant letters of administration to some competent person who may be nominated to the court by either of them, but in all cases the surviving husband or wife or the persons so nominated by him or her, respectively, shall have the preference, and if none of the persons hereinbefore mentioned applies within sixty days from the death of the intestate, the county court may grant administration to the public administrator of the proper county, or to any creditor who shall apply for the same. If no creditor applies within fifteen days next after the lapse of sixty days as aforesaid, administration may be granted to any person whom the county court may think will best manage the estate: *Provided*, that in

all counties having a population of two hundred thousand inhabitants or over, it shall be the duty of the county court to commit the administration of such estate to the public administrator of the proper county. In all cases where the intestate is a non-resident, and in all cases where the intestate is without a widow, next of kin or creditors in this State, but leaves property within the State, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over. And in all cases where any contest shall arise between the widow, heirs-at-law, next of kin, or creditors of the intestate, in relation to the grant of letters of administration, and it shall appear to the court that the estate of said intestate is liable to waste, loss or embezzlement, administration to collect shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over: *Provided*, that no administration shall, in any case, be granted until satisfactory proof be made before the county court to whom application for that purpose is made, that the person in whose estate letters of administration are requested is dead, and died intestate: *And provided further*, that when the heirs are resident of this State, and the estate is solvent and without minor heirs, and it is desired by the parties in interest to settle the estate without administration, this law shall not apply: *And provided further*, that no non-resident of this State shall be appointed administrator, and no non-resident shall be appointed or act as executor." (4 Starr & Curt. Ann. Stat. p. 32).

*First*—The third sentence of section 18, as above quoted, is claimed to be unconstitutional as being local or special legislation. The provisions of the constitution, which it is said to contravene, are section 22 of article 4, and section 29 of article 6 of the constitution. (1 Starr & Curt. Ann. Stat.—2d ed.—pp. 134 and 158). Section 22,

so far as it is necessary to quote the same in the present case, provides that "the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For \* \* \* regulating the practice in courts of justice. \* \* \* In all other cases where a general law can be made applicable, no special law shall be enacted." The portion of said section 29, which is applicable here, is as follows: "All laws relating to courts shall be general and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." The sentence in question, in providing that "in all cases where the intestate is a non-resident, and in all cases where the intestate is without a widow, next of kin or creditors in this State, but leaves property within the State, administration shall be granted to the public administrator of the proper county, when such county contains a population of two hundred thousand inhabitants or over," is certainly special legislation, because it can only apply to Cook county, inasmuch as Cook county is the only county in the State, which has a population of two hundred thousand inhabitants. We have held that a designation of counties as a class according to a minimum population, "which makes it absolutely certain but one county in the State can avail of the benefits of the law applicable to such class, can not but be regarded as a mere device to evade the constitutional provision forbidding special legislation." (*Devine v. Commissioners of Cook County*, 84 Ill. 590; *Cummings v. City of Chicago*, 144 id. 563). The third sentence of said section 18, being the one here under consideration and quoted in the statement preceding this opinion, in excepting Cook county from its operation, rests upon no just or reasonable basis of classification. There is no reason why administration should be granted to the pub-

lic administrator in Cook county, and not to the public administrator in any other county, where the intestate is a non-resident, or dies without a widow, next of kin or creditors in Illinois, and leaves property within Illinois. If, in such case, it is proper to select the public administrator as the person to administer upon the estate in Cook county, it would be equally proper to select the public administrator to administer upon such an estate in any other county.

The appointment of an administrator, and the mode of selecting an administrator, certainly constitute a part of the practice in probate courts, which are courts of justice. A law, which provides a different mode of appointment or selection, for a county having a population of two hundred thousand inhabitants or over, from that which provides for such appointment or selection in counties having a less number of inhabitants, is a special law regulating the practice in courts of justice. It makes the practice as to the mode of appointing and selecting administrators different in one county from what it is in other counties, without resting such difference upon any reasonable basis of classification. Under section 29 of article 6 of the constitution above quoted, the "proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." This provision of the constitution is violated, where one mode of appointing and selecting administrators prevails in the probate court of one county, and a different mode prevails in the probate courts, or county courts having probate jurisdiction, of the other counties. While it is true that a classification of the counties of the State by population, as a basis for legislation, is valid, yet all legislation on that subject must be by uniform and general laws. There must also be some reasonable relation between the situation of counties classified and the purposes and objects to be at-

tained. In other words, as has been said, "there must be something in the nature of things which in some reasonable degree accounts for the division into classes." (*People v. Martin*, 178 Ill. 611; *Knopf v. People*, 185 id. 20; *People v. Board of Supervisors*, id. 288; *People v. Knopf*, 183 id. 410). It is difficult to conceive of anything in the nature of things, which, in any reasonable degree, accounts for the division of counties into classes, having populations exceeding two hundred thousand inhabitants and having populations less than two hundred thousand inhabitants, so as to make it proper to appoint the public administrator in counties of the former class and some other person in counties of the latter class, where the intestate dying is a non-resident, or has no widow, or next of kin, or creditors in this State.

We are, therefore, of the opinion that the probate court of Cook county decided correctly in holding that the clause of section 18 here under consideration is unconstitutional, as being special legislation. A general law, applicable to all the counties in the State, could as well have been passed, as the special law here attacked as unconstitutional.

*Second*—The next question is, whether or not the non-resident sister of the deceased intestate, Jeremiah Ahearn, had the right to nominate to the probate court a competent person to act as administrator. Mary Lavis, the sister, did nominate the appellee to the probate court to be so appointed, and the probate court appointed appellee in accordance with her nomination.

Section 18 provides that "administration shall be granted upon the goods and chattels of decedent to the surviving husband or wife, or to next of kin to the intestate, or some of them, if they will accept the same, or the court may grant letters of administration to some competent person, who may be nominated to the court by either of them," etc. The nomination of appellee was made within sixty days after the death of decedent, such

being the time required by the statute. The words, "who may be nominated to the court by either of them," refer back "to the surviving husband or wife or to next of kin to the intestate." The next of kin to the intestate can nominate a competent person to the probate court to act as administrator. Here, Mary Lavis, the decedent's sister, was one of the next of kin to the intestate. It is true that she was a resident of the State of Massachusetts, and not of Illinois, but the language of the first sentence of section 18 is broad enough to include a person, occupying the position of next of kin who is a non-resident, as well as a person who is a resident. It is true, also, that, in a subsequent part of the section, no person who is not a resident of the State can be appointed administrator; but there is no statement anywhere in the section that a non-resident next of kin may not nominate a person to act as administrator, provided such person is a resident of Illinois. The reasons, which would militate against the appointment of a non-resident as administrator, would not apply to the selection of a resident administrator by a non-resident kinsman. The court could not call a non-resident administrator to account, as could be done in the case of a resident administrator, nor could the court exercise over a foreign administrator the same degree of control in the management of the estate, as it could exercise in the case of a resident administrator. But whatever advantage would be secured to the estate by the selection of a resident administrator would be gained, as well when such resident administrator, if otherwise competent, was nominated by a non-resident kinsman of the deceased, as when he was nominated by a resident kinsman. In other words, it could make no difference in the character of the administration, whether the person, nominating the administrator, was a resident of the State or not, provided the administrator was a resident of this State and a competent person to act.

In *Branch v. Rankin*, 108 Ill. 444, this court had under consideration the construction of section 46 of the Administration act, which provides that: "Whenever any person dies seized or possessed of any real estate within this State, or having any right or interest therein, has no relative or creditor within this State, who will administer upon such deceased person's estate, it shall be the duty of the county court, upon application of any person interested therein, to commit the administration of such estate to the public administrator of the proper county;" and it was there held that the words, "any person interested," were not limited to a person residing in this State, but were general and applicable to a non-resident creditor, it being there said: "This section, in its language, fully covers the present case. It is said, 'any person interested' means such a person residing in this State; but there is no such restriction to be found in the language of the section—the words are general, with no limitation in this respect."

In *Estate of Cotter*, 54 Cal. 215, it was held that the surviving husband or wife of a deceased person, though incompetent to serve on account of non-residence, nevertheless was entitled to nominate a suitable person for administrator.

It has been held in North Carolina that, where the next of kin reside abroad, the court will grant administration to the nominee of such next of kin. (*Smith v. Munroe*, 1 Ired. L. (23 N. C.) 345; *Little v. Barry*, 94 N. C. 433.)

It is true that the third sentence of section 18 provides that in all cases, where the intestate is without a widow, next of kin or creditors in this State, but leaves property within this State, administration shall be granted to the public administrator only when such county contains a population of two hundred thousand, or over. But the third sentence of the section makes no reference to the nomination to the probate court of any competent person to act as administrator. Although

the provision is that, when an intestate dies without a widow, next of kin or creditors in this State, leaving property here, administration shall be granted to the public administrator, yet there is no provision that, if the intestate dies without a widow, next of kin or creditors in this State, and no competent person is nominated by the next of kin, the public administrator is to act. In other words, the provision, that a competent person may be nominated to the court by a non-resident next of kin, would remain and be applicable to all the counties of the State, including Cook county, even though the third sentence of the section were eliminated. As the third sentence now stands, and if it were permitted to remain as a part of the section, it would involve and imply an exception, so far as the nomination of an administrator to the court by a non-resident next of kin is concerned. If the third sentence had provided that, in all cases where the intestate is without a widow, next of kin or creditors in this State, and where no next of kin, either resident or non-resident, nominates a person to act as administrator to the probate court, then a different question would arise, but such is not the language of the section.

We are, therefore, of the opinion that, notwithstanding the elimination of the third section as being unconstitutional, the clause, which authorizes a next of kin, whether resident or non-resident, to nominate an administrator to the probate court, remains and is valid.

Taking this view, that is, that the non-resident sister had a right to nominate the administrator, the probate court of Cook county revoked the letters, issued to the public administrator, and appointed the appellee. We think that this action of the probate court was correct and authorized by the language of the section.

Accordingly, the judgment or order of the probate court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE WILKIN, dissenting.

THE RIVERTON COAL COMPANY v. JOHN E. SHEPHERD  
and  
SAME v. CHARLES L. SHEPHERD.

*Opinion filed February 17, 1904.*

1. EVIDENCE—*objection to hypothetical question should be specific.* An objection to a hypothetical question upon the ground that it does not contain all of the elements should specifically point out the elements alleged to be omitted.

2. SAME—*correct practice with respect to hypothetical questions.* If counsel is of the opinion his opponent's hypothetical question has omitted material facts which the evidence tends to show, he should, on cross-examination, obtain an opinion of the witness upon a hypothetical question embodying such facts.

3. MINES—*what sufficient notice to company of bad condition of mine:* Notice from employees to the mine manager and fire-boss of the bad condition of the mine, and to other officials of the company from the State mine inspector of such condition, is sufficient notice to the company, and the latter cannot escape liability by reason of the fact that it employed a competent mine examiner, who was not shown to have been guilty of willful violation of the statute.

4. SAME—*contributory negligence is no defense to a willful violation of statute.* Contributory negligence of miners is no defense to an action arising from injuries caused by a willful violation by the defendant of the provisions of the statute relating to precautions to be taken for the safety of miners.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. R. B. SHIRLEY, Judge, presiding.

CONKLING & IRWIN, and J. C. MCBRIDE, for appellant.

ROBERT H. PATTON, and JAMES E. DOWLING, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This appeal is from a judgment of the Appellate Court for the Third District affirming two judgments rendered in the circuit court of Sangamon county, one in favor of the appellee John E. Shepherd for \$5000, and another

in favor of his son, Charles L. Shepherd, for \$1500, both against the appellant, the Riverton Coal Company. The suits were for personal injuries growing out of the same accident and are similar in all respects. By agreement of parties they were tried in the circuit court as one case, and are submitted here, as they were in the Appellate Court, upon one set of abstracts, briefs and arguments.

There are four counts in the declaration. The first alleges that on March 18, 1902, the appellant negligently permitted gas to accumulate in the mine, and on account of the lack of air and presence of dust the explosion resulted. The second count alleges that the appellant willfully failed and neglected to have the galleries, roadways and entries in said mine thoroughly sprinkled or cleaned, and that by reason of such failure the said galleries, entries and roadways were so dry that the air became charged with dust, and this, together with the gases accumulated, caused said explosion. The third count alleges five violations of the statute, as follows: First, that appellant did not always maintain sufficient currents of fresh air; second, that appellant did not force currents of fresh air into every working place, thus permitting the accumulation of standing smoke and impure air; third, that appellant did not split or subdivide the main current so as to give a separate current of pure air to every one hundred men; fourth, that appellant did not have a certain permanent door so hung as to close automatically, and that at the junction of a certain cross-cut and the south-east entry west, the door was made of cloth, and on the day of the accident, and some time prior thereto, this cloth had been so torn that it did not perform its functions as a door; fifth, that appellant did not have an attendant at certain principal doorways, and that because of the condition of the air and gases in said entry the explosion occurred. The fourth count alleges that appellant willfully failed and neglected to thoroughly examine said mine as to air currents, gases,

etc. The plea was not guilty and the trial by jury. The circuit court refused proper requests to instruct the jury to find for the defendant as to each count of the declaration. That refusal, with other errors assigned, is urged as ground of reversal.

Briefly, the circumstances attending the injury were as follows: Plaintiffs below were mining coal in defendant's mine, working in a certain room, and on the 18th day of March, 1902, placed two shots, as it is termed, in that room,—one west of the center and in the face of the room, and the other in the north-west corner. When they lighted the shots they ran out of the room to a point in the center of the entry about eighteen feet west of the center of the mouth of the room. One of the shots, as it went off, threw out a large flame, which ran into the entry where they were and burned them. That shot also threw out a large amount of gas which was not consumed, and as it was followed almost immediately by the second shot, that gas, being hot, was ignited and they were again burned by the flames, both being severely burned upon their hands and faces. The evidence tends to show that in the preparation of the shots, firing them and running into the entry they exercised reasonable care and skill.

It is first claimed that the trial court erred in permitting Otto Wenneborg to answer a hypothetical question put to him. This question is quite lengthy and includes the elements upon which appellees base their case, and from these elements the witness was asked his opinion as to the cause of the explosion. It is claimed that this question assumes that there was coal dust circulating in the air, and does not contain all of the elements necessary to a proper answer to the question. An examination of the record shows that the objection as made was not specific and did not point out the elements alleged to have been omitted. It was certainly not the duty of the trial court to go through the record to ascertain

whether all of the elements were included in the question, and it was the duty of the appellant to call the specific attention of the court to the admission, and failing to do so it certainly has no cause of complaint in this court. An examination of the evidence, however, shows that the question as asked was in substantial accord with the evidence. If counsel for the defendant claimed that other material facts should have been included in the hypothesis, they had a right, on cross-examination, to take the opinion of the witness upon their version of the testimony. On the objection made the court did not err in its ruling upon the question.

We are also of the opinion that the court properly refused to instruct the jury to find for the defendant, there being at least some competent evidence fairly tending to support the several counts of plaintiffs' declaration. Witnesses testified that the curtain across the cross-cut, mentioned in the declaration, had been torn for three or four weeks and was in that condition on the date of the accident; that the mine manager and fire-boss had been notified of that fact, and also that the air was bad in the mine by reason of that condition, and were asked to remedy it; that the manager replied that he would do so as soon as he could get the hole in the curtain fixed, or words to that effect, and the fire-boss replied that he had done all he could, and that he had reported it. One of the witnesses asked the fire-boss if he had made this report in the book, to which he replied that he had not, but that he had reported it to the manager, Marsh. Several witnesses testified that the air was bad in the rooms, and that the lamps burned very low during the day and charred the wicks, which was an indication of the presence of gas, called "black damp." Others testified that every time the drivers came in with a car the mules would kick up a dust and it would rise very thick; that the dust in the back entry was at least one inch or more thick, and was composed of fire-clay and coal, which

dust had accumulated from the tramping of the mules' feet and the travel in the entry. Witnesses also testified that they had notified the fire-boss and the mine manager of this condition and asked them to sprinkle the entry, and that it was not done because, as was claimed, the water tank was too high for the entry and they could not go down the entry with the tank. This testimony certainly tended to show that the mine was rendered unsafe through the negligence of defendant's employees, and while much of it was contradicted by witnesses for the defendant, it cannot be said that there is a want of evidence to support the plaintiffs' cause of action.

But it is said that notice to the mine manager and fire-boss does not constitute notice to the defendant, and that having employed a competent mine examiner, who was not shown to have been guilty of willfully violating the statute, it cannot be held liable, and that the appellees, who knew of the condition, were guilty of such contributory negligence as should preclude their right of recovery. With this position we cannot agree. The State mine examiner testified that he visited the mine on January 16, 1902, and then ordered the company's officials to remove the dust from the entry-ways, to sprinkle the roads and put up the canvas sheet. We are unable to see what further evidence of notice to the company could have been given than through this mine manager and other officials. As to the plaintiffs below being themselves guilty of negligence, it need only be said that even if it were true that they did not exercise due care for their own safety, still, if the evidence fairly tends to prove, as we think it does, a willful violation of the statute, their right of action would not be defeated. Even under the first count the rule is that "an employee does not assume all the risks incident to his employment, but only such as are usual, ordinary and remain so incident after the master has taken reasonable care to prevent or remove them, or if extraordinary, such as are so obvi-

ous and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment." (*Chicago and Alton Railroad Co. v. House*, 172 Ill. 601.) There is no evidence in this record to show that the danger which the plaintiffs encountered was so imminent that any reasonably prudent man would have abandoned the work, and, therefore, in no view of the case can it be said that they were guilty of such contributory negligence as will bar their right of recovery.

We think the Appellate Court properly disposed of the case, and its judgment will therefore be affirmed.

*Judgment affirmed.*

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THE CHICAGO CITY RAILWAY COMPANY

v.

WILLIAM B. CREECH.

*Opinion filed February 17, 1904.*

1. **TRIAL**—*scope of cross-examination is largely within the discretion of trial court.* The scope of cross-examination is largely within the discretion of the trial court, being governed by the direct testimony of the witness and the circumstances attending the giving of his evidence.

2. **SAME**—*witness may be cross-examined as to all bearings of his direct testimony.* A witness may be cross-examined as to his direct testimony in all of its bearings, and as to whatever goes to explain, modify or discredit the same.

3. **SAME**—*counsel entitled to reasonable latitude in argument to jury.* In argument to the jury counsel are entitled to make reasonable comment upon the evidence and the conduct of witnesses, it being a question largely in the discretion of the trial court whether, under the circumstances, alleged abuse by counsel of such privilege should be ground for new trial.

4. **SAME**—*when absence of judge from the court room will not reverse.* Retirement of the trial judge from the court room to chambers, leaving the door open, while the argument to the jury was going on, although not approved practice, is not ground for reversal, where no rights of the parties were prejudiced thereby.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RUSSELL P. GOODWIN, Judge, presiding.

WILLIAM J. HYNES, and WATSON J. FERRY, (MASON B. STARRING, of counsel,) for appellant.

WING & WING, and ELA, GROVER & GRAVES, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This action on the case was brought by appellee, against appellant, in the circuit court of Cook county, to recover damages for personal injuries alleged to have been sustained through the negligent management of one of its cars by its employees.

Between five and six o'clock on the afternoon of July 6, 1897, the plaintiff, who was an iron and brass molder employed in the city, boarded a car of the appellant company on South Halsted street to go to his home. The car was so crowded with passengers that he was compelled to ride upon the foot-board, which he did, on the west side of the car, near the front. It was south-bound, and the injury occurred about one hundred and fifty feet south of Thirty-fourth court, at which place there is a double track, the distance from the west rail to the curb on Halsted street being about fifteen and one-half feet. In front of a coal office stood an express wagon, with the horse facing south. A large coal or ice wagon came into Halsted street from Thirty-fourth court and turned south on the west side of the street, and as it came near the express wagon the driver turned his team to the east, for the purpose of passing around that wagon. As he was passing the express wagon the car came from the north, and struck the wagon in such a manner as to injure the plaintiff by pressing him between

the coal wagon and one of the posts of the car, fracturing his ribs, collar bone and otherwise severely injuring him. Upon a trial by jury, verdict and judgment were rendered in his favor for \$4500, which have been affirmed by the Appellate Court, and hence this appeal.

But three grounds of reversal are here urged: First, that the trial court erred in excluding and in admitting evidence; second, appellant was deprived of a fair and impartial trial because of improper remarks and conduct of counsel for appellee; and third, the trial court erred in the refusal of instructions asked on behalf of appellant.

Under the first head it is contended that the court erred in restricting cross-examination of appellee and his witnesses, and in permitting appellee's counsel to cross-examine appellant's witnesses upon matters not covered by their examination in chief. We have examined the record for the purpose of ascertaining whether or not improper evidence was admitted on behalf of the plaintiff or proper evidence excluded on behalf of the defendant, and without attempting to discuss the question here, it is sufficient to say that no reversible error was committed in that regard.

The principal complaint of counsel for appellant is as to the ruling of the court on the cross-examination of witnesses. Many of the objections were simply that the questions were not proper cross-examination. The scope of a cross-examination is necessarily largely within the discretion of the trial court, being governed by the direct testimony of the witness and other circumstances attending the giving of his evidence, and it has been held to be erroneous for the trial court to restrict the cross-examination to the extent of preventing the party from going only into the matters connected with the examination in chief, it being his right to elicit suppressed facts which weaken or qualify the case of the party introducing the witness or supporting the case of the party cross-examining. A witness may be cross-examined as

to his direct testimony in all of its bearings, and as to whatever goes to explain or modify or discredit what he has stated in his first examination. (1 Thompson on Trials, sec. 405, p. 367.) This rule has been often recognized and approved by this and other courts. We think the cross-examination in this case on either side was substantially in compliance with correct rules of evidence, and that no error was committed by the trial court in his rulings in that regard. Nor do we find any substantial fault with the conduct of counsel for plaintiff in his manner of examining the witnesses, as objected by counsel for appellant. Doubtless on either side there was some objectionable conduct by counsel, but not such as calls for any criticism here.

Under the second point it is insisted that, in the argument to the jury, counsel for appellee went outside the record and commented on matters upon which there was no evidence, and made unwarranted appeals to class prejudice for the purpose of prejudicing the jury. We have held that in the argument of cases to juries, attorneys must be allowed to make reasonable comment upon the evidence and upon the conduct of witnesses giving their testimony; that the interest of public justice requires that counsel should not be subjected to any unreasonable restraint in this regard; that the matter is one which must be left largely to the sound discretion of the presiding judge, it being for him to say, under all the circumstances of the case and in view of the remarks preceding the argument objected to and the temper and character of the jury, whether or not a new trial should be granted for the misconduct of counsel by way of improper argument to the jury. (*North Chicago Street Railroad Co. v. Cotton*, 140 Ill. 486; *Illinois Central Railroad Co. v. Beede*, 174 id. 13; *West Chicago Street Railroad Co. v. Annis*, 165 id. 475; *North Chicago Street Railroad Co. v. Anderson*, 176 id. 635.) We have read the argument of counsel so far as it appears in the abstract of the record, and are of the opin-

ion that no substantial error was committed by the court in refusing a new trial on that ground.

Under this same head it is further contended that the presiding judge was absent from the court room during the argument to the jury, and therefore failed to pass upon all the objections interposed by the appellant. It appears from the record that at the beginning of the argument a large number of instructions were handed by counsel for appellant to the judge to be given to the jury, and he retired to his chambers to look them over, leaving the door between him and the court room open, through which he could see and hear what was going on in the court room. We do not wish to be understood as approving of the practice, but think, as we have frequently held, that the presiding judge should be present in the court room during the entire trial, unless it should become necessary for him to be absent, in which case he should suspend the trial until his return. The record, however, here shows that the violation of this rule was but technical and that no rights of the parties were prejudiced thereby. We do not think that reversible error is shown by the absence of the trial judge.

The third ground of reversal urged, as above stated, is the ruling of the court upon instructions. The record shows that no instructions whatever were asked or given on behalf of plaintiff and that twenty-six were offered by counsel for the defendant. Those given at its instance covered, we think, every substantial feature of the case. The complaint of the modification of the two instructions pointed out in the opinion of the Appellate Court by ADAMS, J., and the refusal of a third, is fully and fairly considered and disposed of by that opinion, and we fully concur therein.

There are no reversible errors of law in this record, and the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

RALPH JEFFRIS, County Collector,

v.

ADELINE CASH *et al.*207—405  
212 1 65*Opinion filed February 17, 1904.*

1. **SPECIAL TAXATION**—*city must prove compliance with ordinance.* It is essential to the right of a city to recover a judgment for a special tax for the construction of a sidewalk, that the city shall affirmatively prove that the ordinance has been complied with.

2. **SAME**—*what not a bill of cost such as is required by the Sidewalk act of 1875.* A statement of the total amount of the cost of a sidewalk, charging one-half to material and one-half to laying the walk, is not such an itemized bill of cost as is required by section 3 of the Sidewalk act of 1875.

3. **SAME**—*provisions of the Sidewalk act of 1875 must be complied with.* The provisions of the Sidewalk act of 1875 are for the protection of the property owner, and no special tax can be allowed thereunder without a substantial compliance with such provisions.

APPEAL from the County Court of Coles county; the Hon. T. N. COFER, Judge, presiding.

FRANK C. WINKLER, City Attorney, and JOHN F. VOIGT, Jr., for appellant.

H. A. NEAL, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Coles county, refusing to give judgment against the property of appellees for a sidewalk tax. The trial was held in a summary way without a jury before the court on objections to application for judgment. The property involved was lots 1, 7 and 8 in block 7, in the original town of Independence, (now city of Oakland,) in Coles county, which lots were situated on Pike street in Oakland. The appellees filed objections to the rendition of judgment for the sidewalk tax against their lots. The court heard the testimony of witnesses and received documentary evidence, and sustained the objections to the

application for judgment against the lots in question. Appellant, the county collector, excepted. The present appeal is prosecuted from such judgment.

The objections, filed by the appellees in the court below, and which were sustained, were, first, that the ordinance for the construction of the sidewalk in question did not fix the grade of the walk; second, that there was never filed with the clerk of the city of Oakland, or with the county clerk of said Coles county, a certified bill of the cost of said sidewalk, as provided by the statute, and that objectors had no notice, and no means of knowing what the cost of the sidewalk was; and third, that the sidewalk tax is wholly without authority of law, and illegal and void.

The main objection, relied upon, is the second objection above mentioned. Section 5 of the ordinance for the construction of the sidewalk on the west side of Pike street between Montgomery and Moore streets in Oakland provides that, when any such sidewalk is constructed by the city, the street and alley committee, or a majority thereof, of said city, shall, within fifteen days after its completion, file in the office of the city clerk a certified bill of the cost of said sidewalk, showing in separate items the cost of grading, materials, laying down, and supervision, setting the same opposite the owner or owners, and shall give a description of the land or lots or parcels of ground, touching upon or contiguous to the line of said sidewalk, according to the frontage thereof, stating the measurement of such frontage. Section 3 of the Sidewalk act of 1875, under which the sidewalk was constructed, provides that "such ordinance may provide that a bill of the cost of such sidewalk, showing in separate items the cost of grading, materials, laying down and supervision, shall be filed in the office of the clerk of such city, town or village, certified to by the officer or board designated by said ordinance to take charge of the construction of such sidewalk, together

with a list of the lots or parcels of land touching upon the line of said sidewalk, the names of the owners thereof, and the frontage, superficial area or assessed value as aforesaid, according as said ordinance may provide for the levy of said costs by frontage, superficial area, or assessed value." (1 Starr & Curt. Ann. Stat.—2d ed.—p. 858.)

The street and alley committee of the city of Oakland consisted of three aldermen, to-wit, E. N. Carter, A. E. Thomas, and J. W. Newman. Carter and Thomas, Newman being sick, who were a majority of the street and alley committee, prepared and signed the following paper, to-wit: "We, the undersigned, a majority of the street and alley committee of said city, would most respectfully make report that the city did, pursuant to ordinance of said city, construct a concrete sidewalk on the west side of Pike street, and that the owners of the lot, lots or parts of lots hereinafter described have not paid the cost of the same, and you are hereby directed to collect the same according to law. Adeline Cash, lots 1, 7 and 8 in block 7 of the original town of Independence, (now city of Oakland), Illinois, frontage 231 feet. Cost of material \$73.92; cost of laying down, \$73.92; total cost \$147.84. We, the undersigned, a majority of the street and alley committee of the city of Oakland, in Coles county, Illinois, do hereby certify that the foregoing is a true statement of the cost of material and of laying down of a concrete sidewalk in front of the respective lots above mentioned."

The document above set forth is the only bill of the cost of the sidewalk, which was ever filed by said committee, or a majority of the same, in the office of the clerk of the city; and it needs only a casual examination of the same to show that it is not such a bill of cost, as is required by the statute, or by the ordinance passed by the city council. It does not show "in separate items the cost of grading, materials, laying down and supervision."

It simply divides the entire cost by two, and states that the cost of material is \$73.92 and the cost of laying down is \$73.92, without any statement at all as to the cost of grading or supervision. This paper, purporting to be a bill of the cost of the sidewalk, gives no information, except as to the total cost in front of the three lots owned by appellees.

The city clerk states in his evidence that the paper in question was presented to him a few days before he sent it to the county treasurer and *ex officio* county collector of the county, between the first day of March and the tenth day of March, 1903. He also states that, after he so sent the paper to the county collector, there was no such paper as that on file in his office. The county collector states that the paper was filed with him on March 9, and that it was the authority, under which he put the delinquent sidewalk tax upon the delinquent list for judgment.

Section 2 of the ordinance provided that the cost of the sidewalk, and all expenses connected therewith, should be paid for by special taxation of the lots, parts of lots and parcels of land touching upon the line of said sidewalk, according to its frontage upon said street.

We have held that the provisions of the statute of 1875 are for the protection of the property owner, and that no valid special tax can be allowed thereunder without a substantial compliance therewith. (*Hoover v. People*, 171 Ill. 182; *Vennum v. People*, 188 id. 158; *Holland v. People*, 189 id. 348; *Biggins' Estate v. People*, 193 id. 601). In the case of *Holland v. People*, *supra*, we said: "The next step required by the statute, in order to charge the property with the tax, was that a bill of the cost of the sidewalk, showing in separate items the cost of grading, materials, laying down and supervision, should be filed in the office of the clerk of the village, certified to by the officer or board designated by the ordinance to take charge of the construction of the sidewalk, together with a list

of the lots or parcels of land touching upon the line of the sidewalk, the names of the owners thereof, and the frontage. This certified bill of cost is the basis for a special tax list to be prepared by the clerk."

The city clerk further testified that there was no itemized statement of the costs filed in his office, except a statement of the contract, that is to say, that nothing more was filed than the bill of the amount of the contract. It cannot be said that this statement of the amount of the contract was the itemized statement of the bill of cost required to be filed by the statute, and to be signed by the street and alley committee, or a majority thereof. Indeed, counsel for appellant admit in their brief that this statement cannot take the place of the bill of cost of the sidewalk.

It also appears that no special tax list was prepared by the clerk and filed in his office. It is not clear that a warrant for the collection of the tax was issued by the city clerk to the city collector. No return seems to have been made by the city collector to the city clerk, showing the special tax, or the portion remaining unpaid. In his testimony, the city clerk says: "I wouldn't say whether I issued any warrants for the collection of this tax to the city marshal or not. \* \* \* I think I did issue warrants to the city marshal for this tax, but I would not swear to it; it is my impression that I did issue the warrants." It is essential to the right of the city to recover a judgment for the special tax for building a sidewalk that the city should affirmatively prove that the ordinance has been complied with. (*Hoover v. People*, 171 Ill. 182).

We are of the opinion, that the court below decided correctly in sustaining the second objection made by the appellees to the entry of judgment for the sidewalk tax against their lots.

Accordingly, the judgment of the county court is affirmed.

*Judgment affirmed.*

N. A. FRIER, Admr.

v.

LAURA LOWE *et al.*

*Opinion filed February 17, 1904.*

**FREEHOLD**—*freehold not involved in ordinary petition to sell land to pay debts.* A freehold is not involved in an ordinary petition by an administrator to sell land to pay debts of the decedent unless the title to the real estate is put in issue.

APPEAL from the County Court of Gallatin county;  
the Hon. MARSH WISEHEART, Judge, presiding.

JESSE E. BARTLEY, and W. R. MCKERNON, for appellant.

D. M. KINSALL, and CARL ROEDEL, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This was a petition by the appellant, as administrator *de bonis non* of the estate of Charles Kopf, deceased, in the county court of Gallatin county, to sell real estate which it was alleged the deceased died seized of, to pay debts probated and allowed against his estate. A demurrer was sustained to the petition on the single ground that the administrator was appointed administrator *de bonis non* whereas he should have been appointed administrator *de bonis non* with the will annexed, the deceased having died testate.

Without entering upon a consideration of the merits of the case, the appeal must be dismissed for want of jurisdiction in this court. It is difficult to perceive why an appeal should have been taken directly to this court from the county court in view of our former decisions holding that in an ordinary petition to sell real estate to pay debts no freehold is involved, (*Fields v. Coker*, 161 Ill. 186,) and that it is only in cases where, upon such a petition, the title to real estate is put in issue that

this court can entertain jurisdiction on a direct appeal. (*Lynn v. Lynn*, 160 Ill. 307; *Richie v. Cox*, 188 id. 276.) The appeal in this case should have been taken to the Appellate Court for the Fourth District.

*Appeal dismissed.*

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GEORGE D. WORMLEY

v.

JOHN T. WORMLEY *et al.*

*Opinion filed February 17, 1904.*

1. **CEMETERIES**—*land may be dedicated for purpose of cemetery.* Land may be dedicated for the purpose of a cemetery without any particular form or ceremony, it being a sufficient dedication if the owner sets apart land for a cemetery and assents to its use as such.

2. **SAME**—*equity will enjoin the owner from interfering with cemetery.* Where land is set apart by the owner for a burial place and used for many years with his consent for such purpose, a court of equity will enjoin him, and those claiming under him, from defacing or meddling with graves.

3. **SAME**—*who may file bill to enjoin desecration of cemetery.* Any person having relatives or friends buried upon the ground which the owner has consented shall be used as a cemetery may maintain a bill to enjoin such owner from desecrating the grave.

4. **PRACTICE**—*when order dismissing bill may be reviewed.* Notwithstanding the complainants take leave to amend after a demurrer is sustained but fail to file the amendments within the time allowed, whereupon the court strikes the amendments from the files and dismisses the bill for want of equity, they are entitled, on writ of error, to show the court erred in dismissing the bill for want of equity upon its face.

5. **PARTIES**—*when bill should not be dismissed, for want of equity, on general demurrer.* A bill should not be dismissed, for want of equity, on general demurrer, if it shows any grounds for equitable relief, even though the temporary injunction granted is dissolved.

6. **SAME**—*when writ of error will not be dismissed for mis-joinder of parties.* A writ of error sued out by only one of the complainants, who names all of his co-complainants and the defendant as defendants in error, will not be dismissed for mis-joinder of parties, where the defendants in error enter their appearance and fail to assign cross-error or ask to be joined as plaintiffs in error, since such action creates a severance.

WRIT OF ERROR to the Circuit Court of Kendall county; the Hon. CHARLES A. BISHOP, Judge, presiding.

This is a bill in chancery, filed in the circuit court of Kendall county on June 10, 1899, by the plaintiff in error, George D. Wormley and all of the defendants in error except John T. Wormley, (said defendants in error, except John T. Wormley, being ten in number,) as complainants, against defendant in error, John T. Wormley, as defendant. A general demurrer was filed to the bill. On January 4, 1901, the demurrer was sustained. Subsequently on April 3, 1901, the bill was dismissed for want of equity, and the costs were taxed against the complainants below, and it was ordered that the defendant below have execution therefor. The present writ of error is sued out for the purpose of reviewing the decree, so entered, which dismissed the bill for want of equity.

In the bill, the orators therein being plaintiff in error, George D. Wormley, and ten other persons, who are defendants in error herein with the defendant in error, John T. Wormley, alleged that in February, 1839, and prior thereto and thereafter, one John H. Wormley was the owner in fee of a certain tract of eighty acres of land in said county, and also was the owner in fee of other lands particularly described in the bill; that such other lands so described constituted in all one-half acre; that said one-half acre of land so described was generally known as the "Wormley cemetery," and had been so known and recognized ever since the year 1839; that, in February and June of 1839, two of John H. Wormley's relatives were buried in said one-half acre of land; that in 1845 a brother-in-law of his was buried on said half acre; that in 1845 John H. Wormley, being the owner of said one-half acre, and of other lands about the same whereon he resided, dedicated by words and acts said half acre for a burying ground for the uses of the Wormley family, and their relatives; that ever since 1839 said half acre has been used by the Wormley family, and the neighbor-

hood, for the uses of sepulture; that, since the year 1845, there have been buried on said dedicated land many persons, the names of about thirty of whom are mentioned in the bill, being of the Wormley family, and relatives of orators; that monuments have been erected over the graves of many of said decedents, many of them by orators; that orators, and other relatives of said decedents, have continued to protect the remains of those buried in said cemetery, and to preserve the identity and memory of their said relatives; that orators have not in any manner neglected to preserve the monuments, erected to indicate the identity and preserve the memory of their said relatives, or to give and continue to said cemetery the character and name of a burial ground, except so far as they have been prevented by John T. Wormley, the defendant; that there were then, at the time of filing the bill, in said cemetery more than eighty graves, cared for and kept by orators, and other relatives of the deceased; that John H. Wormley settled in Oswego, in Kendall county, several years before 1839, and resided on and owned the farm on which said cemetery is located, from the time of such settlement until the time of his death about the year 1890; that during all that time he recognized said cemetery, as the burial ground of his relatives and the neighborhood, and assisted in maintaining the same as such; that, during his lifetime, he, with other relatives of those buried in said cemetery, caused to be erected and maintained a suitable fence, enclosing said half acre dedicated by him as a cemetery; that such fence was kept up by orators, and other relatives of the deceased, until prevented by the defendant in a violent and unlawful manner; that, upon the death of John H. Wormley, the defendant, John T. Wormley, as his son and heir, came into the ownership and possession of the farm, on which said cemetery is located, and still owns and possesses the same; that, for many years after his coming into such ownership of said farm, he recognized the said

cemetery as the burying ground of and for the Wormley family and neighborhood, and that the same had been dedicated by his father, John H. Wormley, for such purposes; that said cemetery is located on said farm on the line of the Aurora and Oswego wagon road, and ingress and egress in and out of said cemetery can be had without in any way interfering with, or trespassing on, the lands or premises of the defendant, John T. Wormley; that lately said defendant has torn down the fence, surrounding said cemetery, and is pasturing cattle, horses and swine therein; that he has defaced, and is defacing, the monuments and desecrating the graves in said cemetery; that he threatens to shoot and kill any persons, who attempt to fence said cemetery, or care for the monuments and graves therein; that he threatens to enter and remove the monuments therein, and to plow and cultivate the land therein; that, by threats and force, he prevents orators, and other relatives of the buried, from replacing the fence or caring for the monuments and graves in said cemetery; that orators fear that he will carry his threats into execution, unless restrained by the order of the court. The bill thereupon prays that John T. Wormley may be restrained by injunction from defacing, or in any manner interfering with, the monuments and graves in said cemetery, or with orators, or any one of them, in fencing said cemetery and preserving the monuments and caring for the graves therein, or in any way interfering with the fence or fences of said cemetery, now or hereafter erected; that, upon a final hearing, it may be ordered and decreed that said described one-half acre of land, known as the "Wormley cemetery," has been dedicated to the Wormley family, and their relatives, and neighborhood contiguous thereto, as a burying ground; that said injunction may be made perpetual, and orators may have such other relief as equity may require, etc.

ALDRICH & WORCESTER, for plaintiff in error.

HOPKINS, DOLPH & SCOTT, for defendant in error John T. Wormley.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—It is well settled in the United States, that cemeteries are among the purposes, for which land may be dedicated; and it is held that, upon such dedication, the owner is precluded from exercising his former rights over the land. (5 Am. & Eng. Ency. of Law,—2d ed.—p. 784, and cases referred to in notes).

It is also well settled, that a court of equity will enjoin the owner of land from defacing, or meddling with, graves on land, dedicated to the public for burial purposes, at the suit of any party, having deceased relatives or friends buried therein. (*Beatty v. Kurtz*, 2 Pet. 585; *Davidson v. Reed*, 111 Ill. 167). In the case of *Beatty v. Kurtz*, *supra*, the Supreme Court of the United States, in speaking of property consecrated to cemetery purposes, held that the removal of the memorials, erected by piety or love to the memory of the good, are such acts as can not be "redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living." In *Davidson v. Reed*, *supra*, two persons, residents in the neighborhood of a public burying ground, having friends buried there, filed a bill to enjoin the party owning the tract of land, on which it was located, from defacing the graves, and to preserve the ground for the public use for burial purposes; and it was there held that they could maintain the bill in their names, for the benefit of themselves, as well as if all others directly interested had joined.

It is also well settled, that no particular form or ceremony is necessary to dedicate land for the purposes of a cemetery. All that need be shown to constitute such

dedication is the assent of the owner, and the fact that the land is used for the public purposes, intended by the appropriation. Staking off ground as a cemetery and allowing burials therein amounts to a dedication. An express setting apart of land for such a purpose by the owner may constitute a dedication of the land as a burial ground or cemetery. (5 Am. & Eng. Ency. of Law,—2d ed.—p. 784; 9 id. p. 28; *Hagaman v. Dittmar*, 24 Kan. 42; *Hayes v. Houke*, 45 id. 466). It has been held that the notorious use of property for twenty years for burial purposes with the acquiescence of the owner affords presumptive evidence of its dedication for such purposes. (*Boyce v. Kalbaugh*, 47 Md. 334).

In *Davidson v. Reed*, *supra*, this court held that a dedication of land to the public for any public use may be shown by grant, by user, or by the acts and declarations of the owner, coupled with evidence of acceptance by the public; and that, where there was evidence of an intent to dedicate, no particular form or ceremony is necessary. In *Davidson v. Reed*, *supra*, it appeared that the owner of a quarter section of land as early as 1844 buried a child in a corner thereof, since which time the same had always been used by the people of the neighborhood as a public burying place, and the declarations of such owner showed an intent to devote the land to such use, and the subsequent owners of the quarter section of land made no objection to such use, but recognized the same as a public burial place; and it was there held that these facts were sufficient to show a dedication of the land so used to the public for a place for the interment of the dead.

In *Alden Coal Co. v. Challis*, 200 Ill. 222, we have recently held that the Statute of Frauds does not apply to dedication of ground to the public, but that the same may be evidenced by acts and declarations without any writing, and that no particular form is necessary to the validity of the dedication, it being properly a question

of intention, and that a dedication may be established by parol. (See also *Cincinnati v. White*, 6 Pet. 440). In *Alden Coal Co. v. Challis*, *supra*, we also held that the acceptance necessary to complete such dedication may be implied from acts and from user; and that, when the dedication is beneficial or greatly convenient or necessary to the public, an acceptance will be implied from slight circumstances.

By comparing the allegations of the bill in the case at bar, as the same are set forth in the statement preceding this opinion, with the allegations of the bill, passed upon by this court in *Davidson v. Reed*, *supra*, it will be found that the two cases correspond in all essential particulars. It appears from the allegations of the bill in the present case that, during the lifetime of John H. Wormley, the original owner of the land dedicated for the purposes of the Wormley cemetery, he recognized the half acre of ground here in question as a cemetery for a period of about fifty-one years, to-wit, from 1839 to his death in 1890. During that time he not only buried his own relatives upon this half acre, and permitted others to bury their dead there, but he indicated his intention to make such dedication, and to continue it, by positive and open acts. He, with others who buried their dead upon the half acre, caused to be erected and maintained a suitable fence, enclosing such half acre. He permitted the persons, who buried their dead there, to erect monuments over them, and to protect and preserve the identity of the remains buried there. The bill alleges that more than eighty persons have been buried in the cemetery, and that their graves have been cared for and kept up by their relatives. John H. Wormley died in 1890, and the defendant, John T. Wormley, his son, for more than ten years after that date, recognized the half acre as a cemetery, and did nothing to interfere with its use as such, until about the time the present bill was filed. The bill also alleges that he has committed acts of dep-

redation upon the cemetery by tearing down the fence surrounding it, and by pasturing his horses and cattle and swine therein; and also that he not only threatens to kill persons, who attempt to re-build the fence around the cemetery, or care for the monuments and graves therein, but also threatens to remove the monuments erected to commemorate the dead, and to plow and cultivate the land therein. The demurrer, filed by the defendant, admits all these allegations of the bill to be true. When the land descended to John T. Wormley from his father, he inherited it subject to the rights, which had been acquired in this half acre as a cemetery. The assent of his father to its use for such purposes is clearly averred in the bill, and it is also alleged therein, and shown, that it was accepted by the parties using it for the purposes, for which it was dedicated by the owner.

Under the facts and under the authorities applicable thereto, we are of the opinion that the court below erred in sustaining the demurrer to the bill, and that such demurrer should have been overruled.

*Second*—Some points of a technical character are insisted upon by the defendant in error, John T. Wormley, as justifying the action of the trial court.

When the order was entered on January 4, 1901, sustaining the demurrer to the bill, leave was granted to the complainants below to file an amendment to the bill by January 26, 1901. This order seems to have been entered by mistake in term No. 18 of the law side, instead of term No. 18 of the chancery side, of the docket of the October term, 1900, of the circuit court. The amendments were not filed within the time, allowed by the court, to-wit, by January 26, 1901, and were not filed until April 1, 1901. On April 3, 1901, they were stricken from the files for non-compliance with the order, which required them to be filed by January 26, 1901.

Defendant in error insists that, by taking leave to amend their bill after the demurrer was sustained, the

complainants confessed the demurrer, and waived all right to except to the ruling of the court in sustaining it. In support of this position counsel cite many cases, which apply, as a rule thus insisted upon, to common law pleadings. It is also said that the decision of the trial court in sustaining the demurrer was merely interlocutory, and that, if complainants were willing to rest their case upon the demurrer, they should have moved the court to dismiss the bill, and should have entered of record their election to abide by it. It is also said that, where a demurrer to a bill in chancery is sustained and no amendments are made within the time prescribed by the court, the court may dismiss the bill. We do not deem it necessary to pass upon the validity of these contentions as we do not regard them as being applicable to the present case.

The record does not show that the court dismissed the bill because the amendments, which the complainants were given leave to file, were not filed within the time specified in the order. The court merely struck the amendments from the files because they were not filed within the time allowed. If, then, the case had been allowed to stand upon the order, sustaining the demurrer to the bill, a different question would be presented. The question would then arise whether it was not the duty of the complainants to dismiss their bill, in order to take an appeal to, or sue out a writ of error from a reviewing court. But the court itself dismissed the bill, entering the following order, to-wit: "And the court thereupon orders and decrees that the bill of complaint filed herein be and the same is hereby dismissed for want of equity, and that the costs in this cause be, and the same are hereby taxed against the complainants, and that defendant have execution therefor." The court, having sustained the demurrer, dismissed the bill of its own motion for want of equity. The order, so dismissing the bill, was not an interlocutory order, like the order sustaining the

demurrer, but was a final order. We see no reason why the complainants had not the right to review this final order by writ of error. Independently of the question, whether the complainants, by taking leave to amend the bill, waived their right to complain of the action of the court in sustaining the demurrer to the bill, they have the right to show, if they can, that the court erred in dismissing the bill for want of equity upon its face.

It is also said that the *jurat* attached to the bill was not in proper form, but we regard this as immaterial, for the reason that the insufficiency of the *jurat*, if it existed, went only to the temporary injunction, which was granted. It had no effect upon the bill as a whole. There was sufficient equity in the bill to justify its retention, so as to require the defendant to answer it, even if the defective verification was such as to authorize the court to dissolve the temporary injunction. A bill should not be dismissed for want of equity on general demurrer where it shows any ground for equitable relief. (*Gooch v. Green*, 102 Ill. 507; *Wescott v. Wicks*, 72 id. 524.) In the latter case of *Wescott v. Wicks*, it was held that "although a case is so defectively made by a bill in chancery that the court cannot fully comprehend it, and pronounce upon it with confidence, still, if the court can see from what is stated that there is equity in the bill, it is error to sustain a demurrer to the whole bill for want of equity."

*Third*—It is further claimed by the defendants in error that the writ of error should be dismissed for misjoinder of parties. All of the defendants in error, except John T. Wormley, were co-complainants in the court below with the present plaintiff in error, George D. Wormley, and claimed the same rights; and it is said that they should have been joined here as plaintiffs in error with George D. Wormley. The general rule undoubtedly is, that all the plaintiffs or defendants, against whom a joint judgment is rendered, must be joined as plaintiffs in error where a writ of error is sued out by one or more

of them. Section 70 of the Practice act provides that, in all cases where a judgment or decree shall be rendered against two or more persons, either one of them may remove such suit to the Appellate Court by appeal or writ of error, and for that purpose shall be permitted to use the names of all such persons, if necessary. (3 Starr & Curt. Ann. Stat.—2d ed.—p. 3099; *McIntyre v. Sholtz*, 139 Ill. 171; *Cooke v. Cooke*, 194 id. 225). It is true that the present plaintiff in error, George D. Wormley, could have used the names of all his co-complainants in the court below, as co-plaintiffs in error with himself in suing out the present writ of error. As was said in *McIntyre v. Sholtz*, *supra*, (p. 176): "All the plaintiffs or defendants in the original suit who are alive must join in the writ of error, and it is competent for one to join the others without their consent. The reasons for this rule are, that the writ must agree with the record, and that, if one of a number of plaintiffs, or one of a number of defendants, who have not distinct and several interests, should be permitted to bring a writ of error, every one might do the same, and such a practice would tend to multiply suits. If the parties, whose names are thus used by a co-plaintiff, or co-defendant, choose to abide an erroneous judgment, and refuse to appear and assign errors, they must be summoned and severed, and then after the severance the writ may be prosecuted in the name of such co-plaintiff, or co-defendant." If in the present case George D. Wormley had sued out the writ of error in his own name, and also in the names of the other co-complainants with him in the court below, and if they had refused, when their names were so used, to join in the prosecution of the writ, he could have summoned them into court, and obtained a judgment of severance against them, so that then he could have prosecuted the writ alone, and as sole plaintiff in error. (7 Ency. of Pl. & Pr. pp. 860-862). While this was not done in the present case, yet when George D. Wormley sued out the

writ of error alone in his own name, he made all of his co-complainants below defendants in error with the defendant below, John T. Wormley. All of his co-complainants have been served as defendants in error or have entered their appearance as defendants in error. They are, therefore, before this court. They might have assigned cross-errors, or they might have asked to be joined with George D. Wormley as co-plaintiffs in error for the purpose of prosecuting the writ of error. They have not taken any such steps. But being before the court as defendants in error by entry of appearance, the case stands in the same position as though there had been a summons and a severance. They are in court, and this would be the only effect, which could result from a summons. Where there are several defendants in an action, all may plead jointly one and the same defense, or each may plead a separate defense for himself, and in the latter case he is said to sever; and his doing so is termed severance in pleading. (25 Am. & Eng. Ency. of Law,—2d ed.—p. 631). In the present case, there is an actual severance, because the plaintiff in error, George D. Wormley, is prosecuting this writ of error alone, and not jointly with the other complainants in the bill. Their action in declining or neglecting to assign cross-errors, or to unite with him in the prosecution of the writ of error while they are in court by their entry of appearance, operates to create a severance, and justifies him in prosecuting the writ of error alone. For these reasons the motion to dismiss the writ of error is overruled.

Accordingly, the decree of the circuit court, dismissing the bill for want of equity, is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

## THE CITY OF ROCKFORD

v.

DANIEL W. MEAD.

*Opinion filed February 17, 1904.*

CONTRACTS—*contract cannot be binding in part, only.* In the absence of anything indicating an intention to limit the acceptance by a city of a written proposition for the construction of a public improvement, the contract, which is made in accordance with the terms of such proposal, is binding in its entirety.

*City of Rockford v. Mead*, 106 Ill. App. 278, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Winnebago county; the Hon. CHARLES E. FULLER, Judge, presiding.

C. O. CARBAUGH, A. E. FISHER, and C. W. FERGUSON,  
for appellant.

E. P. LATHROP, and R. K. WELSH, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is a suit in assumpsit, brought by Daniel W. Mead against the city of Rockford, in the circuit court of Winnebago county, Illinois.

The record discloses the following state of facts: Prior to January 18, 1897, appellee, Daniel W. Mead, submitted to the city of Rockford a written proposition to increase the water supply of the city. This proposition included the sinking of a shaft, the construction of tunnels, the furnishing of pumps and engines, and all mechanical appliances to take the water from wells or tunnels and deliver it to a pumping pit or reservoir, and the construction of a suitable building to protect the shaft and machinery. On the date named the city entered into an agreement with appellee in accordance with the terms of said written proposition, a copy of which proposition was incorporated in and made a part of the con-

tract. By the provisions of the contract the appellee agreed that he would do the necessary work and supply materials and machinery for the development and delivery into the present pumping pit or reservoir of the city, of a supply of artesian water amounting to five and one-half million gallons per day; that to do this he would sink a vertical shaft into the stratum of clay below the sand and gravel deposits, to be connected with the various artesian wells existing and such additional wells as appellee might sink to obtain the guaranteed amount of water; that at or near the base of the shaft he would erect three pumps, each of a capacity of three million gallons in twenty-four hours, or two pumps, each of a capacity of six million gallons in twenty-four hours, to be operated by engines at the surface; that there should be three engines, each connected with and capable of operating one of the pumps, or two engines, each arranged for and capable of operating any two of the pumps, or if only two six-million-gallon pumps were furnished, then there should be two engines, each arranged for and capable of operating one of said pumps; that the contract was made on the guaranty that appellee should furnish a system of water supply having a capacity of five and one-half million gallons per day of twenty-four hours, and that the machinery should be capable of raising six million gallons per day into the pumping pit or reservoir at the city water-works; that upon the completion of the contract and fulfillment of the guaranty the city should pay appellee the sum of \$22,000, and should thereafter pay him, in addition, the sum of \$8000 for the shaft, tunnels and building; that upon the completion of the contract the same should be construed and regarded as a lease between the parties for two years, for the use of the engine, pumps, machinery and fittings of all kinds furnished by appellee for the operation of the pumping plant, and payment was provided to be made therefor, the price paid for rental to be applied on the

purchase price upon terms stated in the contract; that the title and ownership of said engines, pumps and machinery, and all fittings of all kinds provided by appellee for said shaft and building, should be and remain in said appellee until the same should be purchased by the party of the first part, and until payment in full by it of all sums, and interest thereon, payable, or which should become payable, to appellee under the contract. Thereafter said parties entered into a supplemental contract providing for connecting the shaft above mentioned with another well of the city, and they later entered into another contract providing for sinking a new well and connecting the same with the shaft in question, instead of making the connection contemplated in the first supplemental contract. The original and supplemental contracts also provided for certain extra sums or bonuses to be paid under certain conditions, the most important of which was to accrue to appellee in case the supply of water furnished by him should equal or exceed seven million gallons per day, pumped from all the wells.

Appellee installed the system of water-works as proposed by the agreement, placed at the bottom of the shaft three pumps guaranteed to have a capacity of at least three million gallons for twenty-four hours, and furnished three engines capable of operating same. Upon a test of the pumps and engines it was shown that each of the pumps had a capacity of six million gallons in twenty-four hours. Soon after appellee learned the capacity of the pumps, and before final payment was made by the city, and while the plant was still in the custody of the appellee, he notified the mayor that each of said pumps had six million gallons capacity and that he proposed to remove one of the engines and pumps from the plant, but the mayor refused to permit the same to be removed. Afterwards appellee laid the claim before the mayor, the water-works committee and the superintendent of water-works, and a proposition of settlement was

made to the city council but no settlement was arrived at. The city made all the payments provided for by the contract, but refused to surrender the pump and engine in question or to pay any additional amount for the same, as demanded by appellee, and this suit was brought to recover the value thereof. Appellee filed a special count upon the contract between the parties, and the common count. There was a plea of the general issue. The trial resulted in verdict and judgment for appellee for \$6000. The city appealed to the Appellate Court, where the judgment was affirmed, and the present appeal is prosecuted.

Appellant insists there was error in the giving of instructions and the admission of certain evidence. The instructions complained of are the third, fifth, sixth, seventh and eighth given at the request of appellee. These instructions told the jury that appellee, under the contract and lease between him and appellant, had the option to furnish and deliver to the appellant city either three three-million-gallon pumps and engines or two six-million-gallon pumps and engines, and that two pumps of six million gallons each, connected with two engines of sufficient capacity to operate said pumps, would fulfill that part of appellee's contract. By these instructions the court was placing a construction upon the contract between the parties. Appellant claims they are erroneous, for the reason that, although such was the legal effect of the proposition as made by appellee to appellant, appellant refused to adopt that part of appellee's proposition, and provided for suitable pumps and engines for the delivery into the pumping pit of seven million gallons per day, such machinery to be of a certain efficiency and test. Appellant, in its brief, speaking of the instructions complained of, says: "If that part of the proposition of appellee which provided for the furnishing of three three-million-gallon pumps and engines or two six-million-gallon pumps and engines is the contract between appellant and appellee, then, as to that feature, the

court construed the contract aright." Appellant admits that the supplemental contract deals only with the increase of the water supply, and not with the capacity of pumps and machinery, and that by the express provisions of the supplemental contract it was in no way to affect the other provisions of the original contract.

The contract between appellant and appellee was made after and founded upon a proposition in writing made by appellee to appellant, and comprising six typewritten pages of the record, and which is embodied literally and *in extenso* in the contract. The first clause of the contract states the parties and date, followed by a statement of the desire of appellant to increase its water supply, and that "said Mead has heretofore submitted to said city a detailed proposition, in writing, for doing the necessary work and supplying materials and machinery for the development and delivery into the present pumping pit or reservoir of said city of a supply of a capacity of not less than five and one-half million gallons of artesian water per day of twenty-four hours." The third paragraph reads: "And said city has accepted the said proposition of the said party of the second part for the construction of the necessary shaft, tunnel and building mentioned in said second party's proposition, a copy of which said proposition is hereinafter set forth and made a part of this contract." The fourth paragraph is: "And said Mead proposes to provide proper engines, pumps and machinery to equip and operate the shaft and tunnel system proposed to be constructed by him, and shall, and will, lease such machinery and pumps to said first party for the time and upon the rental herein set forth." Then follows the proposition as made by appellee, with the preface: "The proposition of said Mead to said city, showing the detail of construction, is as follows."

The first paragraph of the proposal states, in a general way, the work to be done, and the second paragraph is as follows: "The general features of the works shall

consist of a vertical shaft into the stratum of clay which lies below the sand and gravel deposits at the present pumping works. From the bottom of this shaft one or more tunnels will be excavated to such of the present wells as the contractor may desire to utilize and to such additional wells as he may sink to obtain the guaranteed amount of water. At or near the base of the shaft shall be erected three pumps, each of a capacity of three million gallons per twenty-four hours, or two pumps, each of a capacity of six million gallons per twenty-four hours. These pumps shall be operated by engines located at the surface, and shall be arranged to discharge into the pumping pit and into the reservoir, as desired. A suitable building will be provided to protect the shaft and machinery, and all necessary connections will be made with the present buildings, and everything done to complete a good, substantial and economical plant."

In the proposal, under the head of "Machinery," it is said: "The machinery shall include the pumps, engines, and all mechanical appliances necessary to take the water from the wells or tunnels and deliver it to the pumping pit or reservoir. \* \* \* There shall be three engines, each connected with and capable of operating one of the pumps, or two engines, each arranged for and capable of operating any two of the pumps, or if only two six-million-gallon pumps are furnished, then there shall be furnished two engines, each arranged for and capable of operating one of said pumps, as is found most desirable *and as the contractor may elect.*" There are no further particulars in the proposition in reference to the pumps and engines, and the only provision following the proposition, and contained in the contract based upon the proposition, relates to the capacity or power of the pumps, and is, in effect, that if the pumps shall develop more than sixty millions foot-pounds of duty, appellant shall, in addition to the stipulated price, pay \$300 per million foot-pounds, up to seventy millions so developed.

Having thus gone extensively into this contract, we are unable to agree with the contention of appellant that it did not accept the proposition of appellee in reference to the pumps and engines. The doctrine is too familiar to require citation of authorities, that one cannot accept a proposition in part, but must accept it as a whole or reject it; and while this rule does not preclude parties from agreeing that a proposal shall only be accepted in part, the contract in question is so lacking in any specific declaration of the intention of the parties that the proposition of appellee should only be accepted in so far as it related to the sinking of the shaft and the production of the desired amount of water, that we are entirely satisfied with the construction placed upon it by the trial and Appellate Courts. We think there was no error in giving the instructions complained of.

It is complained that appellee was permitted to detail a conversation had between him and the mayor at the time appellee announced to him the result of the test of the pumps and stated his (appellee's) intention to remove one of the pumps. The reply particularly complained of, as detailed by the witness, was: "Mr. Brown [the mayor] said that he would not permit any engine to be removed, and if the engines were of that capacity he preferred the city should retain it and pay me what it was worth." Of this it is said, that as the mayor had no authority to bind the city the testimony was incompetent. In the view we have taken of this contract we cannot regard the admission of this evidence as reversible error, if it be deemed to be error at all. The contract was in writing, and the remark of the mayor neither tended to enlarge nor change it to the benefit of appellee. Besides, the mayor was allowed to testify in regard to the same conversation and gave quite a different version of it.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

WILLIAM HAWTHORN *et al.*

v.

GRACE A. ULRICH *et al.**Opinion filed February 17, 1904.*

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1. WILLS—*when power of appointment is discretionary as to amount.* Where a will, after devising a life estate to the testator's wife, provides that at her death "one-half of the property then in her possession is to be divided equally between my heirs and one-half to be divided between her heirs in the manner in which she may decide," the wife's power of appointment is discretionary as to the portions of the one-half of the property which shall be given to her heirs, respectively, provided each one is given some portion.

2. SAME—*power of appointment construed as to division of property.* A wife, given power of appointment by will to distribute one-half of certain property remaining at her death to the heirs of the testator, equally, and one-half to her own heirs "in such manner as she may decide," is not bound to give to her own heirs equal shares by reason of a further provision that one of them, named, shall, in addition to a certain specific legacy, "share equally with the heirs in the whole estate," the meaning being that the designated heir must be given at least *as much* as any of the others.

3. SAME—*doctrine of illusory appointment does not obtain in Illinois.* The doctrine of illusory appointment, under which a court of equity might grant relief where one or more members of a class were given a mere nominal share of an estate by the exercise of a power of appointment, leaving the amount discretionary with the donee of the power but requiring each member of the class to receive something, does not obtain in Illinois.

APPEAL from the Circuit Court of McLean county;  
the Hon. COLOSTIN D. MYERS, Judge, presiding.

TIPTON & TIPTON, for appellants.

BARRY & MORRISSEY, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Orin C. McCord died in McLean county, Illinois, testate, on the second day of June, 1899, leaving a widow, Mary A. McCord, but leaving no descendants. By his

will be provided for the payment of his debts and funeral expenses, and then:

"*Second*—I give and bequeath to Mary A. McCord, my wife, all of my personal and real property for her use during her natural life, except five thousand dollars, (\$5000,) which is to go to Grace A. Perkins at such time as my wife may deem wise. At the death of my wife one-half of the property then in her possession is to be divided equally between my heirs, and one-half to be divided between her heirs in the manner in which she may decide. Grace A. Perkins is also to share equally with the heirs in the whole estate at the disposition of the property at my wife's death, in addition to the five thousand (\$5000) already mentioned in this will.

"If at any time my wife deems it necessary to dispose of the property to satisfy demands on her, she is at liberty to do so, and whatever of the estate is left at her death is to be divided as stated above."

The will nominated Mary A. McCord to be executrix without bond.

At the time of his death, in addition to his personal property, testator was seized of sixty-five acres of land in McLean county, fourteen acres of land in Putnam county, and two lots upon which he resided in Normal, McLean county, Illinois. On the 26th day of December, 1902, Mary A. McCord conveyed by deed the land in McLean county to Grace A. Perkins. The deed recites that it is made in payment of the five-thousand-dollar legacy, and also "for the purpose of remunerating the said Grace A. Perkins for services rendered the said Mary A. McCord since the death of the said Orin C. McCord," and purports to be a conveyance by Mary A. McCord in her own right and as executrix. At the same time she executed her last will and testament, which was duly admitted to probate after her death. After the death of her husband Mrs. McCord also sold and conveyed the fourteen-acre tract in Putnam county. She departed this

life in March, 1903, leaving no descendants. By her will she bequeathed \$200 to Susan E. McCord out of her individual estate and the residue of her individual estate to Grace A. Perkins, and provided that the land theretofore deeded to Grace A. Perkins should vest in her in fee, for the purposes stated in the deed, and the will then proceeds:

"By the last will of my husband I was vested with discretion to appoint the distribution of his residuary estate left at my death as therein provided, and in exercise of such discretion and power of appointment, so far as conferred upon me in and by said will, I declare my will and intention as follows: As to the one-half of said residuary property devised and bequeathed to the heirs of my said husband I desire said will carried out strictly in accordance with my husband's wishes. As to the remaining one-half of said residuary estate of my husband in my possession at the time of my death and by him directed to be divided between my heirs in the manner I should decide, it is my will, and I so desire and decide and appoint, that my said niece, Grace A. Perkins, shall take and receive as her share all of said one-half, except that each one of my heirs-at-law other than said Grace A. Perkins shall be given and paid out of said one-half the sum of five dollars (\$5.00), hereby explicitly declaring it to be my desire and decision that said Grace A. Perkins shall receive from my husband's residuary estate all that a proper and legal construction of said will of my husband will entitle her to and all of said estate which I have any right or power to appoint or award to her, except that each of my remaining heirs shall receive said sum of five dollars (\$5.00) therefrom."

Grace A. Perkins was a daughter of a deceased sister of Mary A. McCord. She had been raised in the family of Orin C. McCord and his wife, and had reached womanhood prior to the death of the widow. She has since married, and as Grace A. Ulrich is one of the appellees herein.

On July 3, 1903, William Hawthorn and Amanda McKnight, the appellants, who are heirs of Mary A. McCord, filed their bill for partition in the circuit court of McLean county. This bill was amended several times, and as finally considered stated all the foregoing facts; made the other heirs of Mary A. McCord and all the heirs of Orin C. McCord defendants; charged that one-half of the real estate of which Orin C. McCord died seized, excepting the fourteen acres in Putnam county, is vested in the heirs-at-law of Orin C. McCord and the other half in the heirs-at-law of Mary A. McCord, all subject to the payment of the five-thousand-dollar legacy to Grace A. Perkins; that the deed made by Mary A. McCord for the land in McLean county, which is averred to be of the value of \$9750, was fraudulently and by undue influence obtained by the grantee therein and is a cloud upon the title of the owners of said real estate; prays that the deed to Grace A. Perkins be set aside; that she be charged with rent for the premises described therein, and that partition be had of all the real estate of which Orin C. McCord died seized, which is located in McLean county, among the owners thereof as such ownership is stated in the bill, charged with the payment of the five-thousand-dollar legacy to Grace A. Perkins, now Ulrich. To this bill the circuit court sustained a general and special demurrer interposed by Grace A. Ulrich. The bill was thereupon dismissed for want of equity, and the complainants appeal to this court.

It is first urged that Mary A. McCord took only a life estate under the will of her husband, and that the rule is, that where a power of disposal accompanies a bequest or devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and must be such a disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended, and that by the terms of the will of Orin C. McCord the only power

given to dispose of the fee was a power to be exercised for the purpose of meeting necessary demands upon Mary A. McCord, and that, subject to the exercise of that power for that purpose and the payment of debts and specific legacies, and subject to the life estate of Mary A. McCord, the heirs of Orin C. McCord, as a class, and the heirs of Mary A. McCord, as a class, each took a vested remainder in his estate. The cardinal rule for the construction of wills requires the ascertainment of the testator's intention as he has expressed it by the language used, and when so ascertained it must be effectuated, unless it be in some instance where he uses terms which have a settled and definite meaning in the law, when such terms must be given such meaning even though the result is to defeat the manifest intention of the testator, as sometimes unfortunately occurs in enforcing the rule in *Shelley's case*.

No question arises in this controversy in reference to the portion of the estate of Orin C. McCord which has reached his heirs under his will and under the will of his widow. They do not attack either of the deeds made by Mary A. McCord. The only question that arises is in reference to that portion of the property which the testator intended should pass eventually to the heirs of his wife, and the first position of appellants is, that Mary A. McCord had no power of appointment as to the remainder in the one-half of the estate which was to pass to her heirs, but that such heirs are entitled to take it, share and share alike, and that her appointment is entirely void because beyond the power conferred upon her. The remainder in one-half of the property is "to be divided between her heirs *in the manner in which she may decide*." To put upon this will the construction which appellants ask is to disregard entirely the words italicized. The testator meant them to apply to something. They could not have been intended to apply to the life interest, because his purpose was that she should retain that herself,

and as every word and every clause of the will should be given meaning, this power of appointment must be held to apply to that portion of the remainder which was to pass to the heirs of Mary A. McCord.

In considering the portion of the will that confers the power of appointment, counsel for appellants place great stress upon the sentence which immediately follows, and which is: "Grace A. Perkins is also to share equally with the heirs in the whole estate at the disposition of the property at my wife's death, in addition to the five thousand (\$5000) already mentioned in this will," the argument being, that if she is to share equally with the heirs of the wife, then they must each take an equal amount or her share cannot be equal to the share of each of the others. It must be remembered that the property passing to testator's heirs is to be divided among them share and share alike, and when the language last quoted is considered in the light of that fact, it plainly shows his intention to be that she should share equally with his heirs in one-half of the remainder. In effect she is by this sentence made one of his heirs, and her right to share as one of the heirs of his wife is not prejudiced or lessened or taken away by the five-thousand-dollar legacy. So far as his will is concerned, it simply means that she has an equal right to share with the other heirs of his wife, the right of all, so far as the portion each will take, being equally subject to the power of appointment. Under this power each heir of the wife must take something. The portion which each will take is left to her discretion.

Orin C. McCord, after providing for the payment of legal charges against his estate, and the legacy of \$5000 to the woman who had grown from childhood in his family, and for the maintenance of his wife during her remaining years, was undoubtedly, from the language of his will, animated by a desire to divide the remainder of his property equally between his wife and himself, ulti-

mately vesting the one-half thereof in his own heirs and Grace A. Perkins and the remaining one-half in the heirs of his wife, and knowing his own right to distribute this property among his own heirs in such shares as he saw fit, his purpose was to confer the same right upon his wife in reference to the property that was to pass to her family. At the death of Orin C. McCord her heirs, as a class, took a vested remainder in the portion of his estate which was eventually to pass into their possession, subject to the exercise of this power of appointment. If this be true, however, it is said that her will is a fraud upon the power she possessed, and we are asked to apply the doctrine of illusory appointment and hold the execution of the power void, and direct an equal distribution of the property which by the will of Orin C. McCord was to pass to the heirs of Mary A. McCord, among all such heirs.

Where, by the terms of an instrument, a power is given to appoint property to or among certain persons, the amount that each is to receive being left to the discretion of the donee of the power, and where none of the beneficiaries can be excluded, and where a mere nominal share is appointed to one or more of them, such an appointment is termed illusory. 2 Am. & Eng. Ency. of Law, —2d ed.—p. 475; 1 Bouvier's Law Dic. p. 769.

Formerly, in England, while it was held in a suit at law that the appointment of any sum, however small, to one of the beneficiaries would satisfy the power, in equity the rule was different, and while a court of chancery would not require an equal distribution of the property among all the persons to whom it was to be appointed, still it was held that some substantial amount must be given to each, and where the amount given to any one was merely nominal, the appointment would be set aside and the property distributed in such manner as would seem just to the court. A very interesting discussion of this doctrine is found at page 431 of volume 1 of White & Tudor's Leading Cases in Equity, where it is

said: "Much litigation arose in consequence of the great difficulty of deciding what was a substantial, and not merely an illusory, share, and great dissatisfaction with the doctrine was expressed by the most eminent judges, who endeavored, in many cases, to narrow it. \* \* \*

In the celebrated case of *Butcher v. Butcher*, 9 Ves. 382, the objects of the power were nine in number, and the fund to be appointed amongst them about £17,000. To some of the objects of the power, shares of £200 three per cents, only, were given. Sir W. Grant, M. R., held the appointment not to be illusory, but, like Lord Alvanley, strongly disapproved of this doctrine of equity. 'To say,' he observed, 'that under such a power an illusory share must not be given, or that a substantial share must be given, is rather to raise a question than to establish a rule. What is an illusory share and what is a substantial share? Is it to be judged of upon a mere statement of the sum given, without reference to the amount of the fortune which is the subject of the power? If so, what is the sum that must be given to exclude the inference of the court? What is the limit of the amount at which it ceases to be illusory and begins to be substantial? If it is to be considered with reference to the amount of the fortune, what is the proportion, either of the whole or of the share, that would belong to each upon an equal division? In terms, the power, though limited as to objects, is discretionary as to shares. A court of law says, no object can be excluded; but there it stops. It does not attempt to correct any, the extremest, inequality in the distribution. \* \* \*

As no case has been found in which a sum of this amount has been declared illusory, there is no ground upon which I think myself justified in determining that this is an invalid appointment.' Later, in another case, the same master said: 'I adhere to the rule I laid down in *Butcher v. Butcher*, that I will go as far as I am bound by an authority, but no farther. Show me a case in which a spe-

cific sum or an equal proportion of what would be the share of each object of the appointment upon an equal division has been held to be illusory, and I will, in the same case, make the same decision. But where I am deprived of the guidance or freed from the compulsion of authority I will not hold any appointment to be invalid upon that ground of objection.'" Lord Eldon affirmed this holding of the master of the rolls, (16 Ves. 15,) but expressed the view that it, in effect, destroyed all the authorities, because no two cases would ever be the same, and that if an amount could not be held illusory except by showing that the same amount or the same proportion of an estate had been held illusory in some earlier case, then the doctrine could no longer be applied. The editors of the work from which we have been quoting, state that "the interference of courts of equity in cases of illusory appointments was so unsatisfactory in its results that the legislature at length interfered, and by statute 1 Will. 4, c. 46, passed June 16, 1830, it was enacted that no appointment \* \* \* should be invalid or impeached in equity on the ground that an unsubstantial, illusory or nominal share," only, should be appointed to one or more of the objects of the power.

Appellants cite four cases to show that the doctrine has been adopted by some of the States of the Union.

In *Hatchett v. Hatchett*, 103 Ala. 556, in a suit at law, a plaintiff sought relief for the reason that in the execution of a power he had received merely an illusory appointment. The court said that the doctrine had no standing in a court of law, and that plaintiff's remedy, "if, indeed, he has any upon this aspect, would be in a court of equity."

In *Thrasher v. Ballard*, 35 W. Va. 524, a power was to be executed for the benefit of two. The donee of the power executed it by a will devising all the property to one. In discussing the law of appointment, in meeting the argument of counsel who sought to uphold the exe-

cution of the power, it was said that the donee of the power could not give one child substantially all the estate and give the other only a nominal amount, for the reason that this would be an illusory appointment, but the holding was, that the power of appointment in that case remained unexecuted because no property at all was given to one of the objects of the power.

In *Degman v. Degman*, 98 Ky. 717, a power of appointment existed in the widow of the testator to divide the property among his children as she might think best, at the expiration of her life estate therein. She attempted to execute the power by deed, and conveyed a much greater portion of the property to one of the children than to either of the others, for the purpose of providing for the support of herself and her second husband during their respective lives. These deeds were set aside for the reason that the power of appointment must be exercised for the benefit of the parties entitled to the property and not with a view of benefiting the donee of the power, and for the reason that an appointment for such purpose is fraudulent and void; and it is also said that each of the beneficiaries was entitled to a substantial portion of the estate. The decision, however, could not have been based on the latter ground, because the least amount of property received by either of the children under the deeds was sixty-one acres of land.

In *Clay v. Smallwood*, 100 Ky. 212, testator's daughter was given a power of appointment, to be exercised at her death, for the purpose of distributing a certain share of his estate "to my other children as she may direct." She attempted to execute the power by devising this property to two of her sisters and their children and to the daughter of another sister, excluding entirely other children of the testator. The court held that the attempted execution of the power passed no title whatever, and that all of the children of the testator living at the time of his death took an interest in this property. This was

on the theory that the exercise of the power was void, for the reason that some of the beneficiaries were excluded entirely; but in passing upon the question the court refers to *Kemp v. Kemp*, 5 Ves. 848, *Alexander v. Alexander*, 2 Ves. Sr. 639, and *Degman v. Degman*, *supra*, as authorities for the proposition that each of those entitled must receive a substantial share of the estate.

We think it fair to conclude from these authorities that if the question was properly presented, in Kentucky at least, the rule of the earlier English authorities would be followed. We have, however, been referred to no case, and we have been unable to discover any case, where the doctrine of illusory appointment has been actually applied in any of the American States. In none of the American cases relied upon by appellants has the execution of the power been set aside or held null and void for the reason that the portion received by some one or more of the beneficiaries was nominal or illusory. In the cases where the doctrine has been discussed with favor, and where the holding has been that the power was improperly executed, it has not been on the basis that one or more of the shares was merely nominal.

Pomeroy states the rule to be: "When the trust power is of such a nature that the donee-trustee is authorized to dispose of the property among a class and is clothed with a discretion, a court of equity will not interfere to control that discretion, or interfere with the mode of exercising it, if he does, in fact, make an appointment." 2 Pomeroy's Eq. Jur. sec. 1002.

In a number of American cases, where the question has been properly presented, it has been held that where the power of appointment is to be exercised according to the discretion of the person to whom it is committed, no appointment will be defeated, no matter how unjust or unreasonable it may seem, and no matter how nominal or illusory the portion received by some of the beneficiaries may be, provided, only, that some portion of the

estate passes to each of the objects of the power. *Graeff v. DeTurk*, 44 Pa. St. 527; *Ingram v. Meade*, 3 Wall. Jr. 32; *Fronty v. Fronty*, 1 Bailey's Eq. 527; *Lines v. Darden*, 5 Fla. 51; *VanSyckel's Estate*, 9 Pa. Dist. 367; *Cowles v. Brown*, 4 Call, (Va.) 477.

In *Graeff v. DeTurk*, *supra*, a devisee was authorized to appoint among the heirs of his body, and he exercised the power by giving one of his children one hundred and thirty acres and giving to the three children of another three acres among them. The court, in holding this to be a valid exercise of the power, said the English equity rule, that where there is a power of appointment among several distributees it cannot be legally exercised except by giving to each appointee a beneficial interest in the fund fairly proportioned to the amount for distribution, and that the appointment of a nominal share to a beneficiary is illusory and void, has never been adopted in Pennsylvania.

Certain difficulties in the way of the practical enforcement of this doctrine would cause us to hesitate about adopting it, even if it had received the unquestioning approval of courts of last resort in other States. The only basis upon which a court of equity could interfere would be that the power had not been executed as the testator intended, for the reason that he intended each of the beneficiaries to receive a substantial portion of his bounty. Manifestly he did not intend that they must receive equal portions, or the power to decide what portion each should receive would not have been given another. If, now, a court of chancery determines that the appointment made is a fraud upon the power and shall be set aside for the reason that the donor's purpose has been thwarted, what, then, shall be done with the property? Shall it be distributed equally? That, too, in the absence of a direction to that effect from the donee of the power, would be as manifestly a perversion of his will, and it would seem to be impossible, by any investi-

gation, to determine just what portion each must receive to make the final distribution conform to the desires of the testator. Equity cannot do better than to leave the power of distribution where the testator left it, and refuse to interfere where the power has been executed by conveying to each intended beneficiary some portion, however small, of the testator's property.

In view of the fact that this doctrine was long discredited and reluctantly enforced by the English courts of equity until the steadily increasing dissatisfaction was recognized by a statute entirely forbidding its application, and in view of the further fact that no case, as it seems, can be found in which it has ever been applied by an American court, we are of the opinion that in the light of the authorities above cited from Pennsylvania and other States, and in consideration of the reasons which make against the rule and its enforcement, we would not be warranted in engrafting this doctrine of illusory appointment upon the laws of Illinois.

The execution of the power is also questioned because no person is specifically required to make the payment of the five-dollar legacy to each of the heirs of Mary A. McCord, other than Grace A. Ulrich. It is to be observed that the will directs that these five-dollar legacies are to be paid out of the one-half of the remainder which passes to the heirs of the testatrix. If in that one-half there be personal property sufficient, these legacies will be payable by her executor in due course. If there be not personal property sufficient, we regard the language of the will as sufficient to charge them upon the real estate, and they would then be payable by the principal devisee.

What we have said makes it unnecessary to dispose of the error assigned which questions the conveyance of the sixty-five acres. No one complains of that except the heirs of Mary A. McCord, and as they would, in any event, have no interest in the property beyond the

amounts fixed in her will, the error in sustaining that conveyance, if any there be, is one of which they can not complain.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

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MONROE SEIBERLING

v.

JOSEPH MILLER *et al.*

*Opinion filed February 17, 1904.*

1. **FIXTURES**—*vendee cannot remove fixtures attached under a contract of purchase.* Articles annexed or structures erected by a vendee of land who is in possession under a contract of purchase but who has not obtained title cannot be removed by him without the consent of the vendor, who is not in default under the contract, since it is presumed the vendee intended the articles or structures to be fixtures in view of his expectation to acquire title.

2. **SAME**—*when vendee cannot claim machinery as personal property.* One who enters into a contract for the purchase of land and takes possession thereof, using the building thereon for manufacturing purposes, cannot claim the machinery and appliances in the building as personal property, upon the ground that the same had been attached by a former tenant of the vendor with the intention they should not be fixtures.

3. **EVIDENCE**—*when contract of corporation is admissible.* A contract of purchase by a corporation is admissible in evidence although the word "Manufacturing," used in the name of the corporation, is written "Mfg." in the contract, and although the contract is not under the seal of the corporation.

4. **CONTRACTS**—*when a forfeiture of contract is unnecessary.* When a vendee in possession under a contract to purchase real estate defaults in payment and surrenders possession to the vendor, the question whether the latter declared a forfeiture of the contract is not material in determining whether the machinery and appliances in the building on the land were fixtures or personal property.

5. **PROPOSITIONS OF LAW**—*when propositions of law are properly refused.* The refusal of propositions of law is proper where they are not applicable to the facts of the case or where they present mixed questions of law and fact.

*Seiberling v. Miller*, 106 Ill. App. 190, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

In 1889 Rouse, Hazard & Co., a corporation, engaged in the business of manufacturing bicycles in the city of Peoria. On August 3, 1895, S. B. Hazard and Harry G. Rouse owned the entire stock of the corporation. On that date these men entered into a contract with Theodore J. Miller, by which Miller agreed to erect a factory building upon ten acres of a tract of land the title to which he seems to have acquired in fee ten days after making this contract, and to give to them, on or before November 1, 1896, a clear title to the ten acres, in consideration of which Hazard and Rouse agreed to occupy the factory as soon as completed, to proceed forthwith to manufacture ten thousand or more bicycles for the market of 1896, and to operate the factory for a term of five years from November 1, 1895. The object Miller had in making this agreement seems to have been to increase the value of the surrounding property, to sell enough of it to pay for the erection of the factory building and the original cost of the entire tract, and to have some property remaining out of which to make a profit on the transaction. It appears that Joseph Miller and Frank Miller, appellees, erected this building in question and had the same completed in the fall of 1895. Rouse, Hazard & Co. furnished and installed in the building, engines, pumps, boilers, shafting, heating apparatus, water system and electric light system, including dynamo, and machinery and tools, at a cost of over \$60,000, in pursuance of the contract above referred to, for the purpose of manufacturing bicycles, and moved into the building in January or February of 1896. The evidence showed that it carried out its part of the above contract in every respect for a period of two and one-half years, when it became bankrupt.

It appears that Theodore J. Miller on January 2, 1896, conveyed the ten acres involved in this litigation, by trust deed, to Nicholas Ulrich in trust for Joseph Miller & Sons, a partnership, composed of Joseph Miller and Frank Miller, to secure the payment of certain notes, among them being notes signed by Rouse and Hazard and Theodore J. Miller.

On June 30, 1898, Theodore J. Miller conveyed the same property to O. J. Bailey, subject to the aforesaid trust deed, and recites that it includes the buildings and railroad facilities but does not include the machinery in said buildings, which belongs to Rouse, Hazard & Co. On the same day Bailey executed a declaration of trust in reference to the property, stating that he merely held the legal title for the purpose of executing deeds, collecting money from the sales of lots in said ten acres from purchasers furnished by Rouse and Hazard, and turning such money over to Joseph Miller & Sons, to be credited by them upon their indebtedness against the property, until the said indebtedness is paid.

On October 24, 1898, the sheriff, under an execution against Rouse, Hazard & Co., sold to William Jack, acting for the judgment creditors, the fixtures involved in this suit, together with bicycles, office furniture, machinery, etc., then located in the building heretofore mentioned, and executed a bill of sale to Jack therefor. The sheriff took possession of the property levied upon at the time of making his levy and remained in possession until the sale. Jack was notified at the sale, before the property was bid off to him, by a representative of appellees, that appellees claimed the property in controversy as fixtures attached to the building.

On November 4, 1898, appellees and Nicholas Ulrich, trustee, filed a bill in the circuit court of Peoria county to foreclose the trust deed of January 2, 1896, in which it is alleged that the fixtures here involved are part of the realty and are covered by said trust deed; sets up

the sale by the sheriff to Jack; alleges that Jack claims the right to remove them, and asks for an injunction against him for the purpose of preventing such removal.

On January 3, 1899, William Jack, trustee, sold to the Peoria Rubber and Manufacturing Company the property purchased by him at the sheriff's sale.

On January 6, 1899, Theodore J. Miller, Charles W. Constantine (who is not shown to have had any title) and Oliver J. Bailey, by quit-claim deed, conveyed to Joseph Miller and Frank Miller the said ten acres, and on the same date the two persons last named, appellees here, entered into an agreement with the Peoria Rubber and Manufacturing Company for the sale to it of said ten acres and the delivery of a deed therefor upon its making certain payments thereon for the period of two years. By stipulation in the record it is agreed that this company did not make the payments as required.

On January 24, 1899, the foreclosure suit above referred to was dismissed by the complainant.

On April 27, 1899, the Peoria Rubber and Manufacturing Company sold to A. G. Seiberling the property bought by it from Jack, which sale was evidenced by a bill of sale, and on October 27, 1901, A. G. Seiberling sold to Monroe Seiberling, the appellant, the same property, and a bill of sale was given therefor.

By a stipulation of record between the parties to this suit, dated November 7, 1901, it was agreed that Monroe Seiberling surrendered the possession of the premises in question without prejudice to the rights of the parties to try the question of title as to the fixtures mentioned in the declaration, and by another stipulation, made on the same day, the property is to be treated as severed from the real estate by appellant.

On November 7, 1901, appellees commenced a suit in replevin in the circuit court of Peoria county against appellant for certain boilers, engines, smoke-stack, condensers, heaters, boiler feed, pumps, dynamo, wiring,

heating system, shafting, belting and pulleys, fire hydrants, fire extinguishers and water pipe, being a part of the property covered by the various bills of sale. The declaration alleges that defendant took and unjustly detains said goods. Pleas of *non cepit, non detinet*, property in defendant, property in A. G. Seiberling, property in the Peoria Rubber and Manufacturing Company, and property in the Consolidated Motor Vehicle Works, were filed, and replications filed by plaintiffs to these pleas. The case was tried before the court without a jury and judgment of guilty rendered against the defendant. A motion for a new trial was made and overruled, an appeal taken to the Appellate Court for the Second District and the judgment of the circuit court there affirmed, and a further appeal taken to this court.

The evidence is conflicting as to whether the fixtures in question can be removed without material injury to the buildings. Only two witnesses testified in reference thereto, one for the plaintiffs and one for the defendant. Plaintiffs' witness gave a detailed description concerning the manner in which the different fixtures were fastened to the floors and walls of the buildings, and stated that they could not be removed without tearing down the walls and materially injuring the buildings. Appellant's witness, without detailing the manner of fastening, stated that in his opinion all the articles could be removed without injuring the buildings. They have never been actually severed from the freehold since they were attached by Rouse, Hazard & Co.

Numerous propositions of law were offered by both parties. The court held those offered by appellees and refused those offered by appellant. The errors relied on for a reversal here, are the holding and refusing of these propositions by the court and the admission of improper evidence.

For the purposes of this suit, in accordance with the stipulation of the parties, the property in controversy

is regarded as having been severed from the land by appellant.

STEVENS, HORTON & ABBOTT, and JACK, IRWIN, JACK & DANFORTH, for appellant.

WINSLOW EVANS, for appellees.

Mr. JUSTICE SCOTT delivered the opinion of the court:

It is unnecessary to determine whether Rouse, Hazard & Co. or William Jack had the right to sever from the freehold the property involved in this suit. In January, 1899, the Peoria Manufacturing Company succeeded to such rights as Jack had, and entered into a contract with the appellees for the purchase of the real estate on which the property involved was located, and thereafter continued in possession of such real estate under that contract until it made default in payment of installments of the purchase price. It was a vendee in possession and the equitable owner of the real estate. The property in question was at the same time on this real estate and attached to the freehold in the most substantial manner. Much of it could not be removed except by destroying masonry and cutting through brick walls. The fiction, based upon an implied condition in the contract between Rouse, Hazard & Co. and Theodore J. Miller, whereby it is claimed this property had continued to be personal property up to that time, if it ever had any legal existence was then at an end. After the execution of the contract between the Peoria Manufacturing Company and appellees, it is not charged that appellees, who were the vendors, were guilty of any default in the performance of that contract. The situation is no more favorable to appellant than if the Peoria Manufacturing Company had actually placed this property upon and attached it to the freehold under its contract of purchase.

The authorities cited by appellant in reference to the right of a vendee to remove improvements of this charac-

ter placed by him upon the real estate where the vendor fails to perform his contract by conveying the title are not in point so far as this transaction is concerned, for the reason that appellees did not fail or refuse to perform their contract.

"Articles annexed or structures erected by a vendee of land who is in possession by virtue of his contract of purchase but who has not yet obtained title to the premises cannot be removed by him without the consent of the vendor, the presumption being, from his interest under his contract and expectation of acquiring absolute title, that he intended the articles or structures to be part of the land." 13 Am. & Eng. Ency. of Law, (2d ed.) p. 672; *Dooley v. Crist*, 25 Ill. 551; *Smith v. Moore*, 26 id. 392; *Ogden v. Stock*, 34 id. 522; *Salter v. Sample*, 71 id. 430.

The objections urged to this view are, first, that the alleged contract between appellees and the Peoria Manufacturing Company was improperly admitted in evidence because it does not purport to be signed by that company. The basis of this objection is, that in the signature the letters "Mfg." appear instead of the word "Manufacturing." This objection is too technical. The letters are an abbreviation of the word, and are no more subject to criticism than the use of the abbreviation "Co." for the word "Company." A further objection to the admission of the contract was, that it is not under the seal of the corporation. This objection is held not well taken in the opinion of this court in *B. S. Green Co. v. Blodgett*, 159 Ill. 169.

It is then said that at the time this contract was made the Peoria Manufacturing Company was in possession of the real estate, and that appellees never had possession and never had title, and could not give possession nor comply with their contract of sale, consequently the contract was without consideration, and void. The answer to this is two-fold: The company was not, in any legal sense of the term, in possession of the real estate. The

possession of Rouse, Hazard & Co. was never transferred by it to anyone, nor did Jack transfer any possession of the real estate to the Peoria Manufacturing Company. It is true, he says he had a custodian in possession of the property he purchased; but his possession was in nowise different from that of one who has personal property stored on the real estate and in the building of another. His possession was no more than that of the sheriff, who levied on the property on the theory that it was personal property. He could not be held to be in possession of the real estate by virtue of such a levy. One of the managers of the manufacturing company testified that it was in possession of the real estate for about two years under the contract of purchase, which shows that they were in possession by virtue of that contract. The contract itself provides that if the company fails to make any two of the payments mentioned, within two years from February 15, 1899, appellees shall have a right to take possession of the premises.

It is urged that when Rouse, Hazard & Co. took possession of the real property under its contract it became the equitable owner thereof, and that it, or its trustee in bankruptcy, so continues to the present time, and that consequently the manufacturing company had a right to act on the theory that appellees were not the owners of the real estate, could not convey the title thereto, and that it therefore was under no obligation to perform its contract, and had a right to remove the property involved in this suit. Rouse, Hazard & Co. had a right to bring a suit in equity to compel Theodore J. Miller to convey to it the fee simple title to this property. It also had a right to abandon the possession and equitable ownership, and rely upon a suit at law for damages on the contract with Theodore J. Miller, the performance of which by him was guaranteed by one Constantine and by Seiberling, the appellant herein, neither of whom is shown to be insolvent. Under such circum-

stances, Rouse, Hazard & Co. would cease to be the equitable owner of the real estate. It is apparent that it did abandon the possession, and under the evidence in this case we cannot hold that it continued to be the equitable owner of the real estate. The record fails to show that appellees could not convey a good title to the manufacturing company.

It is said that no forfeiture of this contract with the manufacturing company was declared. That was wholly unnecessary. The question is whether this property became a part of the freehold. It is stipulated that the manufacturing company defaulted in its payments. The possession of the realty was surrendered to appellees. Whether they formally declared a forfeiture is immaterial.

Upon the undisputed facts of this case these fixtures are part of the real estate.

Six propositions of law were held at the request of appellees. The record does not show any exception to this action of the court, and we are therefore precluded from reviewing it.

The propositions submitted by appellant are fourteen in number and occupy seven pages of the abstract. They were all refused. We have carefully examined each. Their number and length forbid a detailed discussion of them in this opinion. It follows from the views which we have above expressed that the first, second, third, fourth, fifth, sixth, ninth, tenth, eleventh and twelfth of these propositions, if they be otherwise correct, are neither of them controlling in this case, and their refusal was therefore not error. The eleventh is also objectionable for the reason it presents a mixed question of law and fact. We regard the seventh, eighth, thirteenth and fourteenth as incorrect statements of the law.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE COBB CHOCOLATE COMPANY

v.

ALFRED KNUDSON.

*Opinion filed February 17, 1904.*

1. MASTER AND SERVANT—*foreman should take reasonable precautions when ordering servant to do special work.* In ordering a servant to perform work with which he is not familiar it is the foreman's duty to take reasonable precautions for the safety of the servant.

2. SAME—*whether servant should have refused to obey order is for the jury.* Whether the risk attendant upon obedience to the foreman's command was so great that an ordinarily prudent person, under the facts shown by the evidence, would have disobeyed the order, is a question of fact for the jury.

3. SAME—*when servant's knowledge of danger does not relieve master from liability.* The rule precluding recovery by a servant who continues in his employment after he has knowledge of the master's failure to provide a safe place in which to work and of the danger of the work, does not apply where the servant is acting in obedience to the master's orders to do work which is outside of the regular employment.

4. APPEALS AND ERRORS—*when action of court in limiting number of instructions will not reverse.* Limiting the number of instructions in a personal injury case is not ground for reversal, where it appears that the instructions refused were covered by those given, and it is not shown wherein the restriction was prejudicial.

5. INSTRUCTIONS—*instructions may be limited to particular counts.* Instructions for the defendant in a personal injury case may be limited by the court to the count containing the charges which such instructions are designed to meet, where, as to the other counts, the instructions would be improper.

6. SAME—*giving instruction after erasing interlineations is not reversible error.* Giving an instruction, which the court had marked refused and noted his reasons thereon, after erasing the notations and an interlineation intended as a modification by drawing a pen through the words, leaving them still legible, is not reversible error.

7. TRIAL—*when limiting argument to thirty minutes is not an abuse of discretion.* Limiting defendant's argument to the jury in a personal injury case to thirty minutes is not an abuse of discretion, where only six witnesses testified, the testimony of none of them being extended and that of some of them very brief.

8. CONTINUANCE—*when refusal to grant continuance is proper.* Refusal to grant a continuance for an absent witness is proper, where

his testimony, so far as the affidavit discloses, would not materially militate against the theory upon which plaintiff's case was tried and where it does not appear proper diligence was exercised.

*Cobb Chocolate Co. v. Knudson*, 107 Ill. App. 668, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This is an action of trespass on the case by appellee, plaintiff below, against appellant, a corporation, defendant below, in the superior court of Cook county, to recover damages claimed by appellee for injuries sustained by him on September 15, 1899, while working for appellant in its chocolate factory in the city of Chicago. Appellee was injured by his fingers getting caught in the uncovered, revolving cog-wheels of a machine at and about which he was working. Trial was had before a jury, resulting in a verdict and judgment against appellant for \$2500, which judgment was affirmed by the Appellate Court. From the judgment of affirmance appellant prosecutes this appeal.

The machine in question consisted of three granite rollers about twenty-three inches long and nine inches in diameter. Above the rollers was a hopper, into which the chocolate was poured and which then ran from the hopper on to the rollers. The rollers were revolved by means of gearing or cog-wheels attached to the machine at the south side of the machine. The rollers were set in an iron framework. The clearance between the inside of the frame and the end of the roller at the south side of the machine was about three inches. The framework between the south end of the roller and the cog-wheels which operated the rollers was three inches wide, and the distance between the south side of the frame of the machine and the nearest cog was about three inches. The belting which operated the machinery and the cog-

wheels was operated by means of a shifter, which was located a short distance from the machine. By moving the shifter in one direction the belt would be thrown off the pulley and the machine would be stopped; by moving the shifter in the opposite direction the belt was re-adjusted and the machine put in operation. About ten days prior to the accident the appellee, then about seventeen years of age, was employed by appellant to do various kinds of work about the factory, part of said duties being to attend these chocolate rollers at the machine about which he was injured; that in connection therewith he would shovel chocolate into the hopper above the rollers; that the chocolate, passing down on to the rollers, would at times run over the edges thereof, and in such event appellee was required to scrape it up with a knife and return it to its proper place. The cog-wheels spoken of were on the outside of the machine frame, and uncovered, but in the performance of the duties spoken of, appellee was not brought in close proximity to the same.

The declaration contained two counts, the principal averments of the first being, that plaintiff's employment was not attended with hazard or danger; that he was ordered to clean the rollers and wipe all the machinery around the rollers with a piece of waste; that the cog-wheels and gearing, part of said machine, were unguarded, rendering it dangerous to work in close proximity thereto and to do the work ordered done; that plaintiff was ignorant of the danger and it was defendant's duty to so notify him, but defendant negligently failed so to do; that while plaintiff was so engaged, exercising due care and caution, said waste was caught in said cog-wheels, drawing in plaintiff's fingers and permanently injuring them. The second count averred substantially the same as the first, and in addition that the defendant carelessly suffered said revolving cog-wheels to be and remain without any guard, protection or shield,

and negligently ordered the plaintiff to do such work of cleaning said machine near said cog-wheels without in any way endeavoring to protect, guard, warn or instruct the plaintiff of the danger of said work, and by reason of said negligence the plaintiff, while in the exercise of due care, etc., was injured, etc. The plea was the general issue. At the close of the entire case appellant presented and asked the court to give a peremptory instruction directing a verdict in its favor, which instruction was refused by the court.

Various errors are assigned by the appellant, and an effort will be made to discuss the same in the order presented in the brief of counsel.

HENRY B. HALE, and COX, HELDMAN & LIPSON, (F. M. COX, of counsel,) for appellant.

EDMUND S. CUMMINGS, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

The jury having returned a verdict in favor of appellee, on which judgment was duly entered by the court, and that judgment having been affirmed by the Appellate Court, all questions of fact are conclusively settled, except in so far as the same may be considered by this court for the purpose of determining whether there was evidence tending to support plaintiff's cause of action as alleged in his declaration, which question is presented by the presentation and refusal of appellant's peremptory instruction, and said refusal being assigned by the appellant as error.

The appellee testified that he was nineteen years of age; that he had worked for appellant about ten days prior to September 15, 1899, the day of the injury; that he was hired by William Collins, who, to use appellee's words, "started me off with Jack Rush, foreman on the first floor; Rush put me to work running the chocolate rollers, sweeping, going down for chocolate butter and

to the ice-box, and doing everything,—shoveling chocolate and doing everything all around the shop; Rush gave me instructions as to the different work I did;" that on the 15th of September he was running the little chocolate roller; that he shoveled chocolate into the box on top of the rollers, and with a knife he would scrape the rollers when necessary; that on the outside of the frame of this machine were uncovered cog-wheels, with which he had nothing to do in his work; that on the day in question he was injured a few minutes past five o'clock; that he was cleaning the rollers with a knife, when Mr. Cobb, the president of the corporation, came in, and upon looking around said, "This machine looks pretty dirty all around;" that in a little while Collins, the superintendent, came to him and said: "The old man says it looks pretty dirty around here; you better clean up; you better clean around—clean up;" that Collins then went over to Jack Rush, who was foreman and under Collins, and directly Rush came over and started telling how to clean up. Appellee said: "I was nearly done cleaning the machine, and he put me to work outside of the machine, on framework,—at the other side of the belting, right near the cog-wheels there. At this time Rush was at the other side of the machine leaning on the shifter with his elbow. The shifter was on the right-hand side of him and about five feet away from me. This was the shifter that started and stopped the machine. There are two cross-pieces. I started to clean one—to take the dirt out with a knife. I never saw it cleaned while I was there. I took that out with a knife and started to wipe it out, and when I got through Rush was leaning on the shifter with his elbow and he told me to wipe the space off right near the cog-wheels. He was watching me and pointing out where I should clean. He says, 'Clean it right there,' and started pointing where I should clean. He said, 'Wipe off that there,' and then he would point to where I was to clean. He pointed at these spots, and

they were near the cog-wheels. I kept right on wiping one thing after another and he staid there watching me, and finally the waste got caught and pulled my hand in the cog-wheels." He said Rush then stopped the machine and took him to the office, where the doctor came; that his first finger was crushed at the first joint, the second finger at the second joint and the third finger at the third joint; that when he was cleaning around the gear Rush did not say anything, "only just clean up the chocolate." He further stated that from where he was cleaning to where his fingers were caught was about an inch or two; that he got the waste from a box about twenty-five or thirty feet from where he was working; that Collins told him to get it; that he had a bunch of waste about as large as his hand and used it as a mop to clean the framework; that he had to hold the waste loose in his hand and there were long pieces of it hanging down; that when his hand was caught he was leaning over, cleaning the frame. In his examination occurred the following questions and answers:

Q. "Now, you knew that was dangerous, didn't you?"

A. "No, I didn't think it was dangerous."

Q. "You didn't?"

A. "No; I thought if it was dangerous he would shut the machine off, because he was leaning right on the shifter."

Q. "You mean that you did not know it was dangerous to work with your right hand close to the cog-wheel with a piece of waste in your hand?"

A. "No; I thought if it was dangerous he would have sense enough to shut the machine off."

Q. "Have you not as much sense as he?"

A. "No; I was only a boy; I had not done much practical work then and he was foreman in the place, and I thought he knew more about it than I did."

Q. "You were only seventeen years old?"

A. "Yes, sir."

Q. "You let Rush do your thinking for you; is that right?"

A. "Yes, that is right—for the foreman."

Appellee further stated that he had worked several different places where there was machinery, and manifested some knowledge of the dangers arising therefrom.

Elmer Jansen, on behalf of appellee, testified that on the day of appellee's injury he was working in appellant's factory and about five or six feet from appellee; that the nature of his work was similar to that of appellee's. He corroborated appellee as to the visit of Mr. Cobb, and as to the direction of Collins to appellee to get the waste, and as to Jack Rush going over to appellee while he was cleaning his machine, and stated that Rush pointed where appellee should clean but he could not hear what was said, and that Rush staid there until the accident occurred.

William Falkenberg testified, in behalf of appellee, that he also worked on a machine just across from him; that Rush gave them directions as to what to do; that he saw plaintiff when he got hurt, being distant six or seven feet. He told of the visit of Mr. Cobb, of Cobb going over to Collins, then of Collins going and talking with plaintiff and then to Rush, after which Rush came to witness and said, "Get a broom and sweep up around here;" that he started to do so, and presently heard some one holler; that he turned around and saw plaintiff was hurt, and that Rush at the same time shut off the machine; that before Rush shut off the machine, he, Rush, was leaning on the shifter.

These three witnesses were all who testified in behalf of plaintiff. On behalf of the defendant, Jack Rush, Mr. Cobb and John Fisher testified. Fisher worked for defendant at the time of the injury and saw plaintiff about fifteen minutes before the injury, when he was cleaning the machine; that he did not see him again before the accident; that at the time of the accident he saw Rush

jump and shift the belt; that he did not see where he jumped from, but he was probably four or five feet from the machine. Rush, defendant's witness, denied directing appellee as testified to by him, and also stated that he had told him not to clean the gears, and that he had also given instructions for the boys not to use waste. Mr. Cobb testified as to his visit to the factory on the day in question, but he had passed from the room where the accident occurred, prior thereto. He further testified as to the arrangement of the machinery.

The above mentioned witnesses were the only witnesses who testified at the trial. There was a conflict between the evidence of the plaintiff and the defendant, but it was the jury's, and not our, province to weigh and reconcile the same. We are only called upon, in this instance, to determine whether there was evidence tending to support the plaintiff's declaration, and it is our opinion that there was adduced ample evidence that at least tended to show that appellee was acting under specific orders of appellant's foreman when he sustained the injury in question, and that, although the cog-wheels wherein the appellee's fingers were caught were uncovered and plainly visible, there was nothing inherently dangerous in the work he was called upon to do. According to appellee's testimony the defendant's foreman was standing a few feet from him, pointing out just what he should do and where he should clean; that his arm rested upon the shifter and in an instant he could stop the machine. Under such supervision it is but natural that appellee's attention was closely fixed upon his work. The waste that he says he had in his hand may have, without negligence on his part, so hung as to become entangled in the revolving cog-wheels and in an instant drawn his hand to the place of danger. Under such circumstances appellee was relieved of the responsibility that might otherwise have been his. Appellee testified that such work was not in the usual line of his employment, and

he well may have failed to appreciate the extent of the danger thereof. Appellee was in a subordinate position and obedience was his duty, unless in so obeying he acted recklessly and without that degree of prudence that would ordinarily have been exercised by an ordinary person of his age, experience and understanding. It was the duty of appellant's foreman to take reasonable precaution for the safety of appellee when he ordered him to work where appellee claims he did and under the circumstances there existing. Whether appellee, under the circumstances disclosed by the testimony herein, acted recklessly, or as a reasonably prudent person under similar circumstances would have acted, were questions of fact to be determined by the jury. *Chicago Edison Co. v. Moren*, 185 Ill. 571; *City of LaSalle v. Kostka*, 190 id. 130; *Western Stone Co. v. Muscial*, 196 id. 382; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 id. 573; *Illinois Steel Co. v. Schymanowski*, 162 id. 447; *Illinois Steel Co. v. McFadden*, 196 id. 344; *Offutt v. World's Columbian Exposition*, 175 id. 472.

In this case we would not be warranted in saying that there was no evidence tending to support the conclusion of the jury that appellee, by the testimony offered in his behalf, established the material averments of his declaration, hence we must hold that there was no error in the court's refusal to give appellant's peremptory instruction.

It is, however, urged by appellant's counsel that the relative position of appellee and the point of the machinery where the injury is said to have been occasioned, and because of the structure and arrangement of the machinery, it was physically impossible for the appellee to have been injured in the manner testified to by him. While the photograph of the scene of the accident that is in the bill of exceptions doubtless conveys to an observer a very good impression of the situation, and though the calculations of counsel may be without fault so far as may now be determined, although there is a conflict in the evidence as to the basis of such calculations, it would

be folly for us, with our present imperfect means for determining such result, to say appellee could not have been injured in substantially the manner described by him. He was leaning over the machine, and if the waste claimed to be in his hand was hanging down far enough to reach the cog-wheels underneath or to one side, and was caught therein, results might happen that it is now impossible to calculate. The inexplicability of accidents is a phase of life familiar to all.

After the jury were empaneled, and before the first witness was sworn, the court entered an order limiting the number of instructions to be given to thirty,—fifteen for plaintiff and fifteen for defendant,—and that no instructions in excess of that number would be examined or received by the court. Appellant insists that such order was reversible error. In the case of *Chicago City Railway Co. v. Sandusky*, 198 Ill. 400, an order substantially the same was entered, and while the court there deprecated the giving of a useless number of instructions, as is so often done, yet it was declared that it was not proper to lay down a hard and fast rule stating the number of instructions that should be given in a case, it being stated that many times a larger number of short, concise instructions were preferable to a limited number of long, diffuse and complicated instructions. In that case the number of instructions was limited to twelve on a side and the appellant had introduced twenty in excess of that number, but in its argument only dwelt upon the injury alleged to have been sustained by the refusal of one of the twenty instructions not received, and the court being of the opinion that the substance of that instruction was contained in an instruction that was given for the appellee, refused to reverse the case. So in the case at bar, upon an examination of the instructions not received, three in number, we find that the substance of each of them was contained in instructions given. The witnesses in this case were few in number and the issues simple, so

appellant was not unduly hampered by being allowed but fifteen instructions. Nor do counsel for appellant, in their contention, point out wherein they were unable, in such number of instructions, to cover the points involved, nor have they shown wherein their cause was prejudiced by such restriction, and we do not see how it could have been, and regard the contention as not well taken.

It is next contended by appellant's counsel that the trial court erred in modifying instruction No. 7 offered for appellant, by inserting therein the clause, "and without special orders from defendant's foreman to do the work in question, and in doing which the accident happened to the plaintiff," and in writing on the margin of said instruction the words, "Refused, as ignoring specific proof of specific orders to do the work in question, and for other reasons," and in also writing thereon the words, "Insertions and erasures by the court;" and by writing on the margin of appellant's eleventh instruction, "Refused, as ignoring specific proof of specific orders, and for other reasons," and in then drawing a pen through all of said words so written in both of said instructions and noted on the margins thereof, in such way as to leave them legible and plainly to be read by the jury. Appellant's contention is, that by the interlineations and writing of the court, though a line was afterwards drawn through the same, undue prominence was given to special features, and that by such writing by the court the jury were erroneously influenced. A number of cases are cited by appellant to sustain this contention, but in our opinion they all fall short of such result. The words crossed out did not constitute a part of the instructions, and without them the instructions were, so far as this objection goes, as appellant desired, and not subject to objection. The instructions must have been read to the jury as presented by appellant, and if afterwards, upon inspection, they found in them certain interlineations

which had been crossed out by the judge, in our opinion it is more reasonable to assume that they were especially impressed with the fact that the judge regarded such interpolations out of place else he would not have crossed them out, and that they should not consider the same, than to assume that the jury were controlled by them to the prejudice of appellant. In the cases cited and commented on by appellant, the language which it was claimed gave undue prominence to a particular point was read to the jury, and in many of them, by means of italicized words or otherwise, special stress was given to the particular language, or the particular part of the instruction that was crossed out was considered by the court to have been necessary to make the instruction good as a whole. In instruction No. 15 given to the jury they were specially instructed that the court did not "intend to indicate to the jury in any instruction, or language used therein, or by anything that may have been said by the court during the progress of the trial, what the fact or facts are upon any question in this case," and that in considering the case the jury "should look solely to the evidence for the facts and to the instructions of the court for the law of the case," and also that the "instructions given by the court must be accepted by the jury as the law governing the case, and the jury will not be justified in finding a verdict contrary to the law as laid down in the instructions." In the cases of *Union Railway and Transit Co. v. Kallagher*, 114 Ill. 325, and *West Chicago Street Railroad Co. v. Dedloff*, 92 Ill. App. 547, it was held that it was not likely that a jury would be misled by portions of instructions so imperfectly erased or crossed out as to leave them legible, and in the present case we think the objection is without merit.

The court limited instructions Nos. 7, 8, 9 and 11 to the second count of the declaration, and this the appellant insists was error. The first count of the declaration charged that appellant ordered appellee to work in close

proximity to the revolving cog-wheels, which work was attended with hazard and danger, of which hazard appellee did not know, and appellant negligently and carelessly failed to warn and instruct appellee with reference thereto. The second count charged that the cog-wheels were wholly unprotected and unguarded, and that appellant carelessly and negligently failed to protect, guard and shield said wheels. Instructions 8 and 9 were based upon the proposition of the cog-wheels being unprotected and uncovered, and limiting said instructions to the second count of the declaration, on the charges of which they were especially based, was proper. Instructions 7 and 11 were based upon the proposition that appellee assumed the risk of dangers plainly visible and understood by him. The evidence clearly showed that the cog-wheels by which the injury was caused were unguarded and unprotected, and the said instructions were, then, applicable to the second count of the declaration, based, as it was, upon the danger and hazards of unguarded and unprotected cog-wheels; but the said instructions, as drawn, did not take into account the effect of specific orders, which there was evidence tending to show, from appellant to appellee to work in close proximity to unguarded and unprotected cog-wheels,—a place of particular hazard,—and the risk assumed thereby, and so such instructions, in the manner given, were not proper under said first count, and the limitation by the court was not error.

The refusal of the court to give instructions 2e, 5d and 13, offered by appellant, is by it assigned as error. Instruction 2e was to the effect that if plaintiff knew, or by ordinary care might have known, that the use of waste by him at the time of and in the work in question was dangerous, yet voluntarily used the same, the defendant was not guilty. This the court refused, as omitting the element of "causal relation, and for other reasons." Instruction 5d was to the effect that if plain-

tiff knew of the danger complained of in the declaration, and knew of defendant's failure to provide a safe place and materials in and with which to work, yet, notwithstanding such knowledge, continued in his work, etc., then the defendant was not guilty. This instruction was refused by the court because of "ignoring proof of specific orders to do the work in doing which plaintiff was injured, and for other reasons." Instruction 13 was to the effect that if plaintiff knew, or by the exercise of reasonable care might have known, of the danger and hazards of his employment, if any such existed, or that in the discovery of such danger and hazard the plaintiff failed to exercise such observation, skill and judgment as he possessed, then the jury should find the defendant not guilty. This instruction was refused by the court "as omitting causal relation between such danger and hazard and the happening of the accident, giving proof of specific orders, and for other reasons." We think, under the evidence, for the reasons assigned by the court, each of said instructions was improper and the refusal thereof was no error.

Counsel for appellant next insist that the court erred in giving to the jury instruction No. 1 as modified, and in modifying the same. The modification consisted in telling the jury that appellee undertook and assumed all ordinary risks incident to his employment and known to him. The instruction as tendered left out of consideration the question of appellee's knowledge of the dangers and hazards of his employment, and was therefore entirely too broad to be accurate. As said in *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, in speaking of a similar instruction (p. 555): The instruction "refused assumes to state, as an abstract principle of law, that every employee is presumed to understand and assume the ordinary risks and hazards of the employment, but it is so framed as to be open to the construction the presumption includes every character of peril or danger that may

possibly arise in the performance of the duty. An employee assumes the risks of known dangers, and such as are so obvious that knowledge of their existence is fairly to be presumed; but the law does not imply he has notice of dangers or perils not obvious to the senses, and arising solely out of extraordinary or exceptional circumstances.—Wharton on Negligence, sec. 206." In *Lake Erie and Western Railroad Co. v. Morrissey*, 177 Ill. 376, a modification of an instruction similar to the one here in question was approved, and we are of the opinion that in this instance no error was committed.

Counsel for appellant next contend that the court erred in giving to the jury plaintiff's instruction "A." Said instruction was as follows:

"The court instructs the jury that if they believe, from the evidence, the foreman of the defendant ordered the plaintiff to work where he was working at the time of the accident in question, the said foreman was chargeable with the specific duty of exercising reasonable care to see that the place where he ordered the plaintiff to work was reasonably safe, and the plaintiff had the right to rely upon the performance of such duty by the foreman before he ordered the plaintiff to work."

The evidence tended to show that appellee was ordered by appellant's foreman to do the particular work in which he was engaged at the time the injury occurred, and in view of such evidence and the averments of the declaration said instruction appears to be in harmony with the cases cited in the beginning of this opinion. Other instructions given in the case told the jury that appellee, in order to recover, must have been in the exercise of reasonable care and caution for his own safety, and that dangers patent, obvious and understood by him were assumed by the plaintiff, so the jury could hardly have been misled by said instruction, even though it did not define the relation of plaintiff and defendant as fully as it should.

Counsel for the appellant further complain that the court abused its discretion in limiting the appellant to thirty minutes in which to argue the case before the jury. There were only six witnesses—three on each side. The testimony of none of these witnesses was very extended and that of some of them was very brief. We can not say that the discretion of the trial judge, under such circumstances, was abused, nor perceive that the rights of appellant were unduly prejudiced by the rule.

It is objected that the court erred in the admission of improper testimony offered by appellee and in permitting appellee to ask leading questions of the witnesses in rebuttal. The testimony objected to was that elicited by the question put to appellee's witness Jansen, "What were the duties of one running that machine?" Upon objection being interposed, counsel for appellee stated that his purpose was to show that the work in which plaintiff was engaged at the time he received his injury was not incidental to the work of running the machine. After some colloquy between the court and counsel the court replied, "Well, the witness may answer what he usually did about the machine,—not what it was his duty to do." The witness then answered: "I cleaned the tin box underneath the machine and whatever was on the floor; I took a knife and scraped that away, but I never cleaned alongside of the cog-wheels." The witness was here stopped, and upon objection and request from counsel for appellant that the answer be stricken, the court said, "Yes, that may be stricken out." We do not think that the action of the court in the regard above mentioned, or in the latitude given counsel for appellee to ask, in rebuttal, a few leading questions, amounted to reversible error.

Counsel for appellant next insist that the court erred in refusing to permit Mr. Cobb, president of the defendant corporation, to answer the question, "What, if anything, do you know about the witness Rush, at or before

the time of this accident, with reference to being a careful and competent foreman?" The question raised an immaterial issue and was upon an immaterial matter, and the objection to it was properly sustained.

Finally, it is contended that the court improperly refused appellant a continuance in the case. The ground on which the continuance was claimed was the absence of one Collins, who was superintendent of the appellant corporation at the time of the injury. Collins was, at the time of the trial, employed in Philadelphia and refused to return to attend the trial. Of this fact appellant was apprised by letter February 24, 1902. It is said that appellant's counsel, Mr. Cox, was sick from the day after this notice was received until March 4, 1902. The motion for a continuance was made on the day of trial, March 12, 1902, prior to which time it does not appear that any effort had been made to procure the deposition of Collins or to postpone the trial. The affidavit does not state that Collins was a witness to the happening of the injury, hence he could not have testified as to what then took place; but the affidavit does state that Collins notified Rush to direct appellee to clean up around the machine, so, as far as the affidavit discloses, the evidence of Collins, if present, would not have materially militated against the theory upon which appellee's case was tried. At any rate, we cannot say that appellant exercised such diligence in the matter that the court's refusal to grant its application for the continuance amounted to an abuse of judicial discretion.

Upon a careful review of this whole case we are of the opinion that no reversible error was committed in its trial, and therefore the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* R. F. Kinsella, County Treasurer,  
v.

CHARLES E. OPEL, County Clerk.

*Opinion filed February 17, 1904.*

1. TAXES—*county clerk can extend taxes only as they appear in the books.* The county clerk is a mere ministerial officer, and in extending taxes he must proceed according to the books as returned by the board of review, and it is not in his power to determine whether or not the taxes are legally assessed.

2. MANDAMUS—*when mandamus will not lie to compel county clerk to extend tax.* Where an assessment made by the supervisor of assessments is removed by the board of review, the county clerk cannot be compelled, by *mandamus*, to extend the tax on the assessment made by the supervisor of assessments, upon the ground that the board of review had omitted to certify the matter to the Auditor for approval, since, if *mandamus* lies at all, it should be against the board of review to compel it to perform such omitted duty.

APPEAL from the Circuit Court of Sangamon county;  
the Hon. JAMES A. CREIGHTON, Judge, presiding.

H. J. HAMLIN, Attorney General, (W. E. SHUTT, State's Attorney, and JOHN G. FRIEDMEYER, of counsel,) for appellant.

MCANULTY & ALLEN, (ALFRED ORENDORFF, of counsel,) for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The Franklin Life Insurance Company is a corporation organized under the insurance laws of the State of Illinois, and its headquarters are in Capital township, Sangamon county. In the year 1902 the company made and delivered to the assessor of Capital township its schedule for the purposes of assessment for taxation, setting out that on April 1, 1902, it had personal property belonging to it of the value of \$248,735. The property was assessed by the assessor at one-fifth of this amount and returned by him to the supervisor of assessments of

Sangamon county. The company had securities, consisting of notes and loans secured by the company's policies as collateral, amounting to \$913,918.70, and promissory notes on policies in force amounting to \$22,268.86, making a total of \$926,187.56, no part of which was included in the schedule furnished by the company to the assessor or included in his assessment. When the books were turned over by the assessor to the supervisor of assessments the latter made a demand upon said company to list said notes and securities in its schedule for assessment and taxation. The company refused to make such schedule, whereupon, after notice to it, the supervisor of assessments made such schedule himself and assessed said notes and securities at one-fifth of the value thereof and the same as the personal property assessment of said company. At the subsequent session of the board of review the company presented its complaint and petition to said board, claiming that the premium notes and loans held by it and assessed by the supervisor of assessments were exempt from taxation, and asked the board to so hold. The board of review sustained the contention, and held that the said notes and loans were not subject to taxation and ordered the amount stricken from the assessment rolls. The board did not make and certify to the Auditor of Public Accounts, for his approval, a statement of the facts in the case and its finding, as required by section 35 of the Revenue act of 1898, and no certificate of approval of said action was given by the Auditor of Public Accounts. At the time the board of review adjourned, the assessment was left in that condition, and the county clerk of Sangamon county refused to extend the taxes upon the amount entered by the supervisor of assessments but removed by the board of review. Thereupon this petition for a writ of *mandamus* was filed in the circuit court of Sangamon county in the name of the People, on the relation of the county treasurer, as supervisor of assessments, against the county

clerk, to compel him to extend the taxes upon the assessments made by the supervisor of assessments. A demurrer was interposed to the petition as filed, which was sustained by the court. There were six special causes of demurrer assigned, but the demurrer seems to have been sustained upon the second, namely, that the supervisor of assessments had no power, under the statute, to list said property for taxation. An appeal has been prayed and allowed from the order of the circuit court sustaining such demurrer.

We do not deem it necessary, in passing upon the case, to consider the question as to whether or not the supervisor of assessments had authority, under the statute, to list said property for taxation. The Revenue law of 1898 specifies the powers and duties of the assessor, of the supervisor of assessments and of the board of review. This assessment was made by the supervisor of assessments and was removed by the board of review, and the petition avers that it was never certified to the Auditor, as required in section 35, nor had the question ever been determined as to the liability of the property for taxation. At the time the books were turned over to the county clerk the assessment had been removed and the books showed that the property was not subject to taxation. The county clerk is a mere ministerial officer, and no judicial acts are required of him in extending taxes. It is his duty, under the statute, to merely extend the taxes as they appear upon the books. He has no right, nor is it his duty, to determine whether taxes have been legally assessed or not. In this case the books as returned by the board of review show that this assessment was not to be extended, and he had no power to go back and review either the acts of the board or of the supervisor of assessments, therefore the demurrer to the petition was properly sustained. The remedy by *mandamus*, if available at all, should have been against the board of review for a failure to certify to the Auditor

its action in removing the additional assessment. The statute clearly points out the mode of procedure in such cases, and that mode should have been pursued.

The judgment of the circuit court will accordingly be affirmed.

*Judgment affirmed.*

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GEORGE R. COOPER, Guardian,

v.

THE BOARD OF REVIEW OF MONTGOMERY COUNTY.

*Opinion filed February 17, 1904.*

1. TAXES—*benefit certificates are taxable though proofs of death have not been made.* Certificates of insurance in benefit societies are taxable as credits after the death of the person whose life is insured, notwithstanding proofs of death are not made by April 1 and the societies have sixty days in which to pay after proofs made.

2. SAME—*benefit certificates presumed to be worth their face value.* In assessing benefit certificates for taxation as credits, the certificates are presumed to be worth their face value.

AUDITOR'S certificate of appeal to review decision of board of review of Montgomery county.

The board of review of Montgomery county assessed appellant, as guardian, the sum of \$4330.00 on a total cash value of personal property; and appellant claims that said property was exempt from taxation for the year 1903. Appellant objecting to the assessment, and claiming that the property was exempt from taxation, the board by its clerk thereupon certified a statement of the facts concerning said assessment to the Auditor of Public Accounts. The Auditor of Public Accounts, being satisfied that such property is liable to taxation, submits the question of its exemption from taxation to this court in accordance with the provisions of the fourth clause of section 35 of the Revenue law of 1898. (4 Starr & Cur. Ann. Stat. p. 1118.)

The facts certified are, that Dr. S. H. McLean, the father of Ben O. McLean, died at Lincoln in Logan county on or about the 18th day of March, 1903, intestate; that, at the time of his death, he held a policy of life insurance in the Modern Woodmen of America for the sum of \$3000.00 payable to said son, Ben O. McLean; that he also held a policy of life insurance in the Court of Honor, in which the said Ben O. McLean was a beneficiary, to the amount of \$1333.33; that each of the above insurance companies is a fraternal beneficiary society; that their manner of paying policies is by an assessment, levied upon the members of said society; that said Ben O. McLean is a minor of the age of seventeen years; that said George R. Cooper filed a petition in the county court of said county, asking to be appointed guardian of said Ben O. McLean, on March 23, 1903; that said petition states "that said minor has due him life insurance to the amount of about \$4200.00; that said George R. Cooper was appointed guardian of said Ben O. McLean by the county court of Montgomery county on March 27, 1903, and duly qualified, and from thence hitherto has been acting as such guardian; that each of said policies of insurance required proof of death as a condition precedent to the payment thereof, and allowed sixty days in which to pay said policies; that, on the first of April, 1903, proofs of death had not been made under either of said policies, nor had any assessments been made on the members of said societies, or either of them, for the payment of either of said policies; that, on April 1, 1903, no money had been paid to said guardian under either of said policies, nor had he taken any steps whatever at that time to collect the same further than to be appointed guardian; that on May 9, 1903, said Cooper received, as such guardian, from the Court of Honor the sum of \$1333.33, and on May 26, 1903, he received, as such guardian, from the Modern Woodman of America the sum of \$3000.00.

LANE & COOPER, for appellant.

H. J. HAMLIN, Attorney General, for the People.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

Upon the certificate of facts, set forth in the statement preceding this opinion, the board of review predicated the right to make the assessment, and it is contended by George R. Cooper, guardian of Ben O. McLean, that the assessment is illegal and contrary to law.

The value of the two policies of insurance was assessed against the guardian as of the first day of April, 1903. "All property subject to taxation shall be listed by the person at the place and in the manner required by law, and assessed at the place and in the manner required by law with reference to the ownership, amount, kind and value on the first day of April in the year, for which the property is required to be listed, including all property purchased on that day. The owner of property on the first day of April in any year shall be liable for the taxes of that year." (4 Starr & Cur. Ann. Stat. p. 1110; sec. 8 of Revenue act of 1898).

The father of the minor, Ben O. McLean, had died early in March, 1903, and Cooper was appointed his guardian on March 27, 1903, and qualified on that date. Was the guardian the owner of the policies on the first day of April?

By the terms of the second clause of section 1 of the Revenue act all "credits" shall be assessed and taxed; and by the first clause of section 6 of the Revenue act, every person of full age and sound mind, being a resident of this State, is required to list all his "credits" and personal property for taxation. (3 Starr & Cur. Ann. Stat. —2d ed.—pp. 3398-3406). In the sixth clause of section 292 of the Revenue act "credits" are defined as follows: "Every claim or demand for money, labor, interest or

other valuable thing due or to become due, not including money on deposit." (3 Starr & Cur. Ann. Stat.—2d ed.—p. 3520). Undoubtedly, the claim of the guardian against the fraternal beneficiary societies, who issued the policies or certificates to Dr. S. H. McLean in his lifetime, comes within the statutory definition of "credits." It, therefore, follows that the claim was properly listed as the personal property of the guardian on April 1, 1903.

It is contended, however, on the part of the guardian, that a full and perfected claim for the amount due upon the certificates had no existence on April 1, 1903. The certificate of facts shows that each of said policies, or certificates of insurance, required proof of death as a condition precedent to the payment thereof, and also that each company had sixty days after the making of proof of death, in which to pay the amount of the policy. It also appears from the certificate of facts, that proofs of death had not been made under either of the policies on the first of April, 1903. It is claimed that the companies were not bound to pay the policies until proofs of death were submitted, and then not until sixty days had elapsed. The contention is, that no valid claim existed against either of the said companies until proofs of death were submitted and until the sixty days had passed, and that, therefore, the guardian was not the owner of any claim on the first day of April, 1903. The statutory definition of "credits" includes every claim or demand for money "due or to become due." The fact, that the claim for the insurance money against the companies was not due until after the lapse of sixty days, would make no difference in view of the fact that, under the statute, a claim for money "to become due" as well as one for money already due, is included within the definition of "credits." The certificate of facts states that Dr. McLean, to whom the policies were issued, had died, and the submission of proof of his death was an act to be performed by the guardian; and if the claim was one,

which was "to become due," it was such a claim as well because it had not matured on account of the delay in filing the proofs of death, as because the period of sixty days had not yet expired. If the claim had been merely one, which would be due in sixty days, it comes within the definition of "credits," which embraces claims "to become due," as well as claims "due;" and it would equally come within the definition, if it was not yet due because the proofs of death had not been made.

It is urged that the board of review could not determine what the value of the policies was on April 1, 1903, and, therefore, that their value should not be taxed. The policies were certainly evidence of claims of the beneficiaries, and what their value was was a question to be determined by the assessor, or the board of review. The value of the policies was fixed at their face value, or the amount due by their terms. This would appear to have been a correct mode of ascertaining their value, as on the 9th and 26th days of May, 1903, the companies paid the full amounts called for by their terms. In such cases, the policies will be presumed to be worth their face value. (*Wedgbury v. Cassell*, 164 Ill. 622).

It is furthermore contended that the money, with which the policies were to be paid, was in the hands of the companies, and that, therefore, they constituted a fund, which belonged to the companies and was taxable as the property of the companies. In support of this position the case of *Catholic Knights v. Board of Review*, 198 Ill. 441, is referred to, and relied upon. In the latter case it was held that a fund in the hands of the treasurer of a benefit society was properly assessed as the property of the society, although orders had before April 1 been issued against a portion of the fund to beneficiaries of deceased members; it being there said: "No part of the fund assessed had been paid out prior to April 1, and it then became liable to the tax in the hands of the treasurer of the institution, who was its lawful

custodian." Taking the ground, that the amount due upon the policies here in controversy was a fund, which belonged to the companies and was taxable on April 1, 1903, as the property of the companies, the objecting guardian contends that, if the claims are assessed against him as his property, there will be a double taxation of the same property. But there is no evidence here that the money was in the hands of the insurance companies on April 1, 1903. It appears from the certificate of facts, that the manner of paying their policies by these companies is by an assessment levied upon the members of the society, and that on April 1, 1903, no assessment had been made upon the members of either of the societies for the payment of either of said policies. As, therefore, the funds were not in the hands of the societies on April 1, 1903, they could not be taxed as property, belonging on that date to the societies or companies. If, therefore, the claims for the moneys due upon these policies are not taxed as the property of the objecting guardian, they will escape taxation altogether for the year 1903.

Counsel for the guardian refer us to no authority, supporting the conclusion that, because the money in the hands of the insurance companies was taxable, the evidences of indebtedness against the insurance companies could not be taxed. A debtor, who has money in his possession on April 1, is subject to assessment upon that money, and a creditor, who holds a note or other evidence of indebtedness against such debtor at the same time, is subject to assessment on that credit according to its value whether due or not.

We are, therefore, of the opinion that the action of the board of review in assessing these claims against the insurance companies, or societies, as being the property of the guardian on April 1, 1903, at their face value was correct; and the decision of the board is approved.

*Decision approved.*

## THE CHICAGO CITY RAILWAY COMPANY

v.

P. H. O'DONNELL, Admr.

*Opinion filed February 17, 1904.*

1. **STREET RAILWAYS**—*party is liable for wanton injury to trespasser.* A street car company is not bound to exercise toward a newsboy stealing a ride the care due to a passenger, but it is bound not to inflict wanton or willful injury upon him.

2. **SAME**—*case must go to the jury if conflicting evidence tends to show wanton injury.* Evidence that conductor in charge of defendant's east-bound car by his threatening attitude compelled a trespassing newsboy to jump from the rapidly moving car, in consequence of which he fell upon the track and was run over and killed by a west-bound car, requires the submission of the case to the jury although the evidence is contradicted.

3. **PLEADING**—*when an objection must be taken by special demurrer.* An objection that a count in a declaration for negligence avers different sets of facts, either of which will justify a recovery, must be pointed out by special demurrer.

4. **SAME**—*when charges in count for negligence are divisible.* Where a single count charges that the conductor of defendant's east-bound car wantonly compelled plaintiff's intestate to jump from the moving car, causing him to fall in a helpless condition on the west-bound track, and that the motorman of the west-bound car wantonly ran over and killed said intestate, the charges are divisible, and in the absence of demurrer, proof of the former charge will warrant a recovery, even though the motorman west-bound was without fault.

*Chicago City Railway Co. v. O'Donnell, 109 Ill. App. 616, affirmed.*

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. A. H. CHETLAIN, Judge, presiding.

**WILLIAM J. HYNES, SAMUEL S. PAGE, and WATSON J. FERRY, (MASON B. STARRING, of counsel,)** for appellant:

The charge in the declaration of willfulness and wantonness was not proved by proof of negligence only, for wantonness is such a want of care and regard for the rights and safety of others as implies a disregard of consequences, while negligence is a failure to exercise rea-

sonable or ordinary care. *Railway Co. v. Bodemer*, 139 Ill. 596; 1 Thompson on Negligence, secs. 22, 23.

It is a maxim in pleading that everything shall be taken most strongly against the party pleading, and that where two meanings present themselves that construction shall be adopted which is most unfavorable to the pleader. *Lemon v. Stevenson*, 36 Ill. 49; Gould's Pl. 141; *Gross v. Ankenbrandt*, 124 Ill. 54; Stephens' Pl. (Tyler's 3d Am. ed.) 333, and authorities cited; *Halligan v. Railroad Co.* 15 Ill. 558.

A party must recover, if at all, upon the case made for himself by his declaration. He may not make one case by his allegations and recover on a different case made by the proof. *Moss v. Johnson*, 22 Ill. 633.

If the pleader, though needlessly, describe the tort, and the means adopted in effecting it, with minuteness and particularity, or the proof should substantially vary from the statement, there will be a fatal variance, which will occasion a non-suit. 1 Chitty's Pl. (7th Am. ed.) 427; *Bloomington v. Goodrich*, 89 Ill. 558.

It is the defendant's right to insist that the grounds upon which the plaintiff claims the right to recover shall be clearly stated and that the case made in the declaration shall be proved as alleged. *Railway Co. v. Friedman*, 146 Ill. 583; *Railroad Co. v. Morkenstein*, 24 Ill. App. 128.

One cannot charge in his declaration, as a ground of action, a specific act of negligence and succeed on the trial by proving a different act. *Railroad Co. v. Bell*, 112 Ill. 360; *Railroad Co. v. Foss*, 88 id. 551; *Ebsery v. Railway Co.* 164 id. 518.

JAMES C. MCSHANE, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an action on the case instituted by appellee, as administrator of the estate of Michael B. Rowen, deceased, in the superior court of Cook county, to recover

damages for the death of said Michael B. Rowen, who was run over and killed by one of appellant's cars. The declaration alleged that his death was caused by willful and wanton conduct on the part of servants of appellant. The plea was the general issue, and a trial resulted in a verdict of \$5000 for appellee. Upon the argument of a motion for a new trial appellee remitted \$1500, and the court overruled the motion and entered judgment for \$3500 and costs. The Appellate Court for the First District affirmed the judgment.

At the conclusion of the evidence in the case defendant entered a motion to instruct the jury to find it not guilty, and the motion was denied.

The declaration contained three counts, but a demurrer was sustained to the first count and the case went to trial on the second and third. The second count alleged that Michael B. Rowen was a minor, aged nine years, and was lying in a helpless condition on the defendant's track in the city of Chicago; that by the exercise of ordinary care on the part of defendant's servants in charge of one of its cars his presence could have been discovered and the car could have been stopped before running over him, but that defendant's servants recklessly, negligently and improperly ran the car over him and killed him. The third count alleged that defendant operated double tracks running east and west on Root street, in said city; that Michael B. Rowen was riding, but not as a passenger, on one of defendant's cars which was running east at such a high rate of speed as to make it dangerous for a person to alight therefrom; that the conductor in charge of said car willfully, wantonly and recklessly, by ordering Rowen to get off the car and by a threatening and menacing attitude toward him, and by attempting to strike and grab him, compelled him to jump from the car, and in doing so he was thrown and fell with great force on the track for west-bound cars, so as to render him helpless; that while so lying in a

helpless condition defendant was running another car west, and the servants of defendant in charge of the same, by the exercise of ordinary care, could have discovered him lying on the track, but that they wantonly, recklessly and negligently ran the car over him and killed him.

There was no evidence tending to sustain the second count. The accident occurred in the evening of January 5, 1900, after dark, and the evidence showed, without contradiction, that the motorman in charge of the west-bound car had no knowledge that any one was lying upon the track, nor any reason to suspect that such was the case, until he received a warning, and that he made every possible effort to stop the car and prevent the accident. There was an entire failure to prove either willful, wanton or negligent conduct on the part of any one in charge of that car. The only evidence tending to sustain a cause of action related to the alleged actions of the conductor of the east-bound car under the charge made in the third count. There were double tracks in Root street, the east-bound cars using the south track and the west-bound the north track. Passengers were not allowed to get on or off the cars from the side next to the adjoining track, and the cars were equipped with iron gates on that side to keep passengers from getting on or off. When the east-bound car reached the Fort Wayne tracks the conductor got off and preceded the car across the railroad tracks and then got on at the front end of the car, coming through and collecting fares. As the car was so crossing the Fort Wayne tracks, Michael B. Rowen, who was a newsboy nine years old, got on the lower step next to the track for west-bound cars, outside of the iron gate. He had some newspapers under his arm and held on to the irons by his hands. A young man named Garfield Andrews stood inside the gate in front of Rowen to conceal him from the sight of the conductor. The conductor having passed through the car to the rear, came out on

the middle of the platform, and Rowen either whistled or Andrews spoke to him, which attracted the attention of the conductor and he asked Andrews who was behind him. Andrews stepped to one side and the conductor saw the boy. The liability of the defendant depends upon what the conductor then did, and that, with the speed of the car, is the only disputed fact in the case. There were but two persons who knew anything about it, one being Garfield Andrews and the other John Nelson, the conductor, and they contradicted each other. Andrews testified that the conductor told the boy to get off, and raised his arm in a threatening attitude and moved toward him; that the witness told the conductor the car was going too fast, and that when the conductor told the boy to get off and moved toward him in a threatening manner, the boy let go and jumped off. The conductor testified that when Andrews moved aside and he saw the boy hanging on the hand-rail next the gate, the witness said, "What are you doing there?" that Andrews said, "Oh, let him ride;" that the boy leaned forward as though he were going to let go or fall off, and the witness said, "Hold on there," and that at the same moment the boy swung aside and jumped off. The evidence for the plaintiff tended to show that the car was going eighteen or twenty miles an hour and the evidence for the defendant was that it was going seven or eight miles an hour. The conductor testified that he did not want the boy to get off at that time; that he did not know him or attempt to make him get off, and that he would not want the boy to jump off going at the rate of speed the car was moving, because he would be likely to fall and be hurt. When the boy swung off, his feet went out from under him and he tripped or fell across the other track. A car was coming from the other way, and Andrews jumped off and ran toward the other car, holding up his hand and shouting. The conductor rang his bell for an emergency stop and then jumped off too. As the cars approached

each other the gongs of both were sounded. Andrews and the conductor both shouted to the motorman of the west-bound car and did everything they could to stop it, and when the motorman saw and heard the warnings he did everything he could to stop.

The boy was not a passenger and had no intention of paying fare, but was trying to get a ride by standing on the lower step and hanging on to the iron outside of the gate, where passengers were not received or allowed to enter the car. The defendant was not bound to exercise toward him the care owing to a passenger, but it was bound to not wantonly or willfully inflict injury upon him. The testimony of Andrews tended to prove a willful and wanton injury and required the submission of the issue to the jury. It seems to be conceded that his testimony did tend to prove such an injury, but it is insisted that the testimony of the conductor was the more probable, and that the circumstances of the case should have convinced the court and jury of its truth. That was a question for the Appellate Court which is no longer open to inquiry. Cars were passing very frequently on the adjoining track, and the tracks were so close together that passengers were not allowed to enter or leave the car on the side next the other track, doubtless because of the danger. If the testimony of Andrews concerning the action of the conductor was believed, the circumstances tended to show that the accident was a natural and probable consequence of the wrongful act, and such as a person of ordinary prudence ought to have foreseen would be likely to result.

It is also assigned as error that the court gave, at the request of plaintiff, the following instruction:

"The court instructs the jury, that if you believe, from the evidence, that defendant's east-bound car, at the time and place in question, was running at such a high rate of speed as to be dangerous for deceased, or any ordinary person so situated, to jump from said car,

and that said conductor, while acting within the scope of his authority as such conductor, if he was so acting, willfully and wantonly compelled deceased to jump from said car in manner and form as charged in the declaration, if he did do so, and while it was running at such rate of speed, and that said conductor's conduct in this regard showed a reckless disregard of deceased's safety, and that deceased was thereby thrown down on the adjoining track and rendered helpless, and while so lying upon said track was run over and killed by the west-bound car before it could be stopped, then you should find the defendant guilty, even though you should find, from the evidence, that there was no fault upon the part of the motorman of the west-bound car."

The rule of law stated in the instruction is correct. If the conductor of the east-bound car was guilty of a willful and wanton act which was the efficient cause of the deceased falling upon the track and lying there in a helpless condition, where he would naturally be in danger of being run over and killed by west-bound cars, the plaintiff could recover although the injury actually resulted without fault of those in charge of the west-bound car. (Cooley on Torts, 70.) The objection to the instruction is based on the form of the pleadings. The instruction could only apply to the third count, which charged wanton and willful conduct on the part of both the conductor of the east-bound car and the motorman of the west-bound car, and it is contended that in order to justify a recovery it is necessary to prove both charges; that the count stated but one cause of action based upon two acts conjointly committed by the conductor of one car and the motorman of another, from which the injury resulted; that the proximate cause of the injury was alleged to be the reckless and wanton negligence of the motorman of the west-bound car and not the act of the conductor in driving the deceased from the east-bound car, and that the instruction was bad in permitting a

recovery where the evidence showed that there was no fault on the part of the motorman of the west-bound car. It is a settled rule that a plaintiff must recover, if at all, on the case stated in his declaration. He cannot make one case by allegation and recover on another case made by the proof; but in this case there was an attempt to state in the declaration two independent wrongful acts, either of which would justify a recovery, and the question is whether the plaintiff was bound to prove both. If the deceased was lying in a helpless condition on the track, and the motorman of the west-bound car, by the exercise of ordinary care, could have discovered him, but wantonly, recklessly and negligently ran the car over him and killed him, the plaintiff could recover, regardless of the question how the deceased came to be on the track. On the other hand, if the deceased was on the track in a helpless condition through the willful and wanton act of the conductor of the east-bound car, plaintiff could recover regardless of the question whether the act of the motorman was wrongful or innocent. No objection was made to the count, and if there was a fault in it, it consisted in the violation of the rule that each count must state a single cause of action, and must not state different facts or sets of facts, any one of which would justify a recovery. That objection is to be raised and pointed out by special demurrer. The alleged acts of the conductor and motorman were not joint or concurrent. Neither was the nature of the act of the motorman, as willful or otherwise, a matter of essential description of the injury which must be proved as laid. We think that the charges were divisible, and the rule is, that in actions for torts plaintiff may prove a part of his charge if there be enough proved to sustain his charge. (*Chicago and Grand Trunk Railway Co. v. Spurney*, 197 Ill. 471.) There was, therefore, no error in giving the instruction.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RY. CO.

v.

LOUISE SMITH.

*Opinion filed February 17, 1904.*

1. **APPEALS AND ERRORS**—*when alleged error as to instructions can not be considered.* Alleged error in giving or refusing instructions cannot be considered, on appeal, unless all the instructions are set out in the abstract of record, where the instructions as to which complaint is made are of such a nature that the court's action may be justified by the character of the other instructions.

2. **TRIAL**—*special interrogatories by court should first be submitted to counsel.* Special interrogatories propounded by the court of its own motion should first be submitted to counsel for the parties, the same as must be done when one party requests a special finding.

3. **SAME**—*when failure of court to submit special interrogatory to counsel is prejudicial.* Where the two material issues, whether plaintiff was exercising due care and whether the defendant was negligent, are controverted, it is prejudicial error for the court to submit a special interrogatory as to the question of plaintiff's care without submitting the same to the defendant's counsel, to enable him, if desired, to have a special finding as to the other issue.

*P., C., C. & St. L. R. R. Co. v. Smith*, 110 Ill. App. 154, reversed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

JESSE B. BARTON, (GEORGE WILLARD, of counsel,) for appellant.

FRANCIS T. MURPHY, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an action on the case, brought by appellee in the superior court of Cook county, against appellant and the Chicago Terminal Transfer Railroad Company, to recover damages for injuries received by appellee on

December 8, 1899, by being struck by an engine at the crossing of appellant's track and Thirty-fifth street, in the city of Chicago. The suit was begun on April 26, 1900, and the declaration contained a single count, alleging that appellant owned the railroad tracks and the terminal company operated an engine and train thereon, and it charged negligence, generally, in the management of the engine and train causing the injury. On September 10, 1901, four additional counts were filed, charging negligence, first, in failing to ring an engine bell as required by a city ordinance; second, in failing to ring a bell or blow a whistle as required by statute; third, that the flagman at the crossing did not give reasonable warning or notice of the approach of the train; and fourth, repeating the charge that the ordinance was not complied with. On September 26, 1901, two more counts were filed, charging negligence, first, in not stationing or maintaining a flagman at the crossing, and not signaling and warning appellee, by its flagman or otherwise, of the approaching engine and cars; and second, in failing to give warning by bell, whistle, flagman or otherwise. The plea was the general issue, and there was a trial, at which appellant and the terminal company each asked the court to direct a verdict of not guilty as to it. The court granted the motion of the terminal company and instructed the jury to find it not guilty, but denied the motion of appellant and submitted the issue to the jury as to it. The court, of its own motion, directed the jury, in addition to the general verdict, to answer the following special interrogatory: "Do you find, from the evidence, that the plaintiff, by the exercise of ordinary care on her part for her own safety, just before and at the time of the accident in question, could have avoided the same?" The jury returned a general verdict finding appellant guilty and assessing the damages at \$2000, and answered "No" to the question propounded by the court. Appellant appealed to the Appellate Court for the

First District, and the judgment being affirmed, prosecuted this appeal.

The following facts were proved on the trial: Thirty-fifth street runs east and west. Crossing it at right angles there are six steam railroad tracks, the west two of which are owned by appellant,—the east one for north-bound trains and the west one for south-bound trains. There are two street car tracks crossing the railroad tracks near the middle of the street. A few feet west of the west track and just north of the curb line of the street is a flagman's shanty. The accident occurred about 2:30 P. M. of December 8, 1899,—a clear, bright day. Appellee and two other women were walking west on the sidewalk on the south side of Thirty-fifth street. They crossed the other tracks, and when they came to appellant's tracks a long freight train was going north on the east track. The women stopped and stood talking while the freight train was passing. The train made a great deal of noise, especially in crossing the street car tracks. As soon as the last car had passed the sidewalk they started to cross the street. At that time a south-bound train was approaching on the west track and was about seventy-five feet north of the street. The brakeman on the rear of the freight train saw the women as the rear of that train approached the crossing, and his attention being called by the whistle of the train on the south-bound track, he raised up and tried to call their attention, but they did not hear him.

The only charge of negligence in the declaration which the evidence tended to prove was, that the flagman stationed at the crossing failed to signal and warn appellee of the approaching danger. That is the ground now relied upon by counsel for appellee, and it is insisted that the flagman was so near the shanty that he could not be seen when the freight train cleared the crossing, and that he failed to give proper warning of the approach of the other train. The bell on the engine was ringing,

as required by ordinance and statute. The whistle was blown before reaching the crossing and was again blown as a danger signal as soon as the women were seen on the track. The only evidence as to the speed of the train was that it was going about ten miles an hour.

The controverted questions of fact at the trial were, whether appellee was in the exercise of proper care and whether the flagman was negligent in the discharge of his duty. The evidence for the respective parties on those questions was directly contradictory. The first of appellee's companions to start across testified that when the freight train got out of the way she looked to see if there was any flagman to warn them if the track was not clear, but she did not see any flagman, and as they saw no one they started over. She passed over the crossing before the train reached it. The second woman testified that there was no flagman east of the freight train and she did not see any flagman, and that she did not look and was not thinking of anything until she heard the noise of the train, when she jumped out of the way. Appellee testified that she looked to see if there was anything to hinder her passing over, and did not see anybody there; that the other women went on, and she looked north just as the freight train got by and saw no one on the street and that there was no one there to warn her. She did not succeed in getting across and was struck by the engine. They all testified that they did not hear any bell or whistle or see or hear any warning. There was a flagman stationed at the crossing and there was also a police officer of the city detailed and on duty there. They both testified that they were standing over by the shanty when the freight train was passing; that when the other train was coming they went out on the middle of the crossing and called out to the women to look out, and warned them from coming over. Another witness, apparently disinterested, testified that he saw the flagman and policeman in the middle of the crossing

shouting and throwing up their hands as a warning. The brakeman on the rear of the freight train testified that as he passed the crossing he heard some one yell, and at the same time the women started to cross the track.

It is assigned as error that the court refused to give certain instructions asked by the appellant. The instructions so refused are the only ones contained in the abstract. Where an instruction is of such a nature that an omission or imperfection in it may be cured by others, an alleged error in giving or refusing it will not be considered unless all the instructions are set out in the abstract. In such a case a refused instruction, although stating a correct principle of law, may have been properly refused because the point was covered by other instructions, or an instruction given which might be objectionable when considered alone would not be so regarded when considered with other instructions which were given. (*Thompson v. People*, 192 Ill. 79.) The instructions refused are within that rule.

It is also assigned as error that the court submitted the special interrogatory to the jury with respect to the care or want of care of appellee without submitting it to appellant's counsel before giving it to the jury. The act of 1887 provides that in any case in which the jury render a general verdict, they may be required by the court, and must be so required on request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury. (Hurd's Stat. 1899, p. 1291.) The statute is mandatory, and where a party to the suit requests a special finding it must be submitted to the adverse party before the commencement of the argument to the jury. (*McMahon v. Sankey*, 133 Ill. 636.) The statute is not in violation of the ancient mode of trial by jury, and should be liberally construed.

(20 Ency. of Pl. & Pr. 307.) The reply of appellee's counsel is, that while the statute is imperative that a party proposing to ask for special interrogatories shall submit them to the adverse party, it does not require the court to do so. It is true that the legislature did not see fit to command the court; but every reason which could have moved them to require the adverse party to submit an interrogatory applies with equal force where the same interrogatory is propounded by the court without a request, and we would scarcely adopt a rule of practice that a court might be less fair and just to a litigant than the statute requires his adversary to be. There are obvious reasons for the provision of the statute. If an interrogatory is to be asked concerning one material fact in the case a party may desire to submit other interrogatories concerning other material facts, and counsel may wish to direct their arguments to the particular point covered by an interrogatory. It was held in *Chicago and Alton Railroad Co. v. Gore*, 202 Ill. 188, that it was legitimate for counsel, in argument, to review the evidence in connection with the special interrogatories, and that it was not improper practice to permit counsel to read them in connection with their argument to the jury, in order to convince the jury that they should be answered in the affirmative or negative. If it should be held proper practice for the court, of its own motion, to give an interrogatory without notice to parties, they would be deprived of the opportunities which the statute secures to them, for the mere reason that the court gives the interrogatory. There might be cases where the submission of questions by the court without notice would not be ground for reversal, where it could be seen that there was no injurious effect; but this case cannot be regarded of that character. There were two material and sharply controverted questions of fact: First, whether appellee was in the exercise of ordinary care for her own safety; and second, whether

appellant was guilty of negligence causing the injury. The court, by its interrogatory, submitted only one of these questions, which was a plain intimation that in the mind of the court such question was the one doubtful or controverted question in the case. There being two important questions, the court directed the jury to return a general verdict and to give an answer to one of the questions. If the interrogatory had been submitted to the counsel for appellant they might not have been willing to have an answer upon one question in the case without an answer upon the other one. We think that the failure to submit the interrogatory to counsel was prejudicial.

The judgments of the Appellate Court and the superior court are reversed and the cause is remanded to the superior court.

*Reversed and remanded.*

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CHARLES A. STONE

v.

THE CITY OF CHICAGO *et al.*

*Opinion filed February 17, 1904.*

1. MUNICIPAL CORPORATIONS—*power of cities to issue twenty-year bonds.* A city organized under the general law has power to issue twenty-year bonds to obtain funds for corporate purposes and with which to raise money to retire outstanding bonds issued by the city, or other indebtedness due from it, notwithstanding the provisions of section 3 of article 7 of the City and Village act, concerning the power to make temporary loans.

2. SAME—*issuing of bonds to pay judgment indebtedness is pledging credit for a corporate purpose.* Issuing twenty-year bonds to raise a fund to pay judgment indebtedness is a pledging of a city's credit for a corporate purpose, within the meaning of paragraph 5 of section 1 of article 5 of the City and Village act.

3. SAME—*city may issue twenty-year bonds to raise money for corporate purposes.* A city organized under the general law may issue twenty-year bonds to raise money for corporate purposes, either under paragraph 5 of section 1 of article 5 of the City and Village

act or under section 1 of the act of 1865, as amended in 1879. (Laws of 1879, p. 229.)

4. *SAME—notice of election under act of 1879, relating to issue of bonds, need be published but once.* The notice of an election to vote upon the question of issuing bonds for corporate purposes, under the act of 1865, as amended in 1879, (Laws of 1879, p. 229,) need not be published more than once.

5. *SAME—a judgment against a city is an evidence of indebtedness.* A judgment against a city is an evidence of indebtedness, within the meaning of the act of 1865, as amended in 1879, (Laws of 1879, p. 229,) authorizing the issue of new bonds by a municipal corporation to re-place old bonds or other evidences of indebtedness issued by the city.

6. *SAME—what items are a part of a city's indebtedness.* Judgments against a city unprovided for; the water fund debt; general bonds and water bonds, are items which are part of the indebtedness of a city, within the meaning of the constitution.

7. *SAME—what items are not a part of a city's indebtedness.* Bonds issued under an amendment to the constitution adopted for the particular purpose of permitting the city to issue them, notwithstanding it had exceeded its limit of constitutional indebtedness; money held by the city treasurer to pay special assessment warrants when presented; unpaid amounts which the city has been assessed for public benefits in special assessment cases; amount of tax anticipation warrants; and floating indebtedness, the money to pay which is in the city treasury, are not part of the indebtedness of the city, in a constitutional sense.

8. *SAME—amount due sinking fund is not a debt against a city.* The amount due the sinking fund is not an indebtedness of the city, but the amount in the treasury which can be properly applied to the sinking fund should be deducted, in estimating the city's indebtedness, from the total amount of the city's bonded indebtedness other than bonds which are not, in a constitutional sense, an indebtedness of the city.

APPEAL from the Circuit Court of Cook county; the Hon. L. HONORE, Judge, presiding.

This was a bill in chancery filed by the appellant, a resident and tax-payer of the city of Chicago, in the circuit court of Cook county, against the city of Chicago, its mayor, Carter H. Harrison, and Lawrence E. McGann, its comptroller, to enjoin the issue and sale of \$4,000,000 twenty-year three and one-half per cent bonds of the city

about to be issued and sold, the proceeds arising from the sale of which were to be used in paying an equal amount of judgments before that time rendered by the Federal courts and the courts of record in the State of Illinois against the city of Chicago. An answer and replication were filed, and upon final hearing the bill was dismissed for want of equity, and the record has been brought to this court for review by appeal.

The appellant contends that the issue and sale of said bonds should be enjoined upon the following grounds: First, the city has no power to issue twenty-year bonds, from the sale of which to obtain a fund with which to pay its judgment indebtedness; second, if the power of the city to issue twenty-year bonds for the purpose of obtaining a fund from the sale thereof with which to pay its judgment indebtedness be conceded, nevertheless, as the indebtedness of the city, in the aggregate, exceeds five percentum of the value of its taxable property as ascertained by the last assessment for State and county taxes, the city is prohibited from issuing said bonds by virtue of the inhibition contained in section 12 of article 9 of the constitution of 1870, which, in part, is as follows: "No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five percentum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness."

The record shows that at a regular meeting thereof on the 22d day of September, 1902, the city council of the city of Chicago duly passed an ordinance providing for the issue and sale of \$4,000,000 twenty-year three and one-half per cent bonds under the provisions of paragraph 5 of section 1 of article 5, chapter 24, of Hurd's Revised Statutes, which reads as follows: "To borrow

money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate to exceed five (5) percentum on the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same."

The ordinance contained the following preamble: "Whereas, the city of Chicago is indebted to divers persons on account of judgments heretofore recovered against the city of Chicago, which said judgments the city of Chicago desires to pay, and to that end to issue negotiable bonds therefor and with the proceeds thereof to satisfy said judgments in full." And section 3 reads as follows: "Said bonds shall be sold by the comptroller of the city of Chicago at public or private sale, at a price not less than their face or par value, and the proceeds thereof shall be used for the exclusive purpose of canceling and retiring the like amount of the indebtedness of the city of Chicago evidenced by judgments recovered against it in the Federal courts and in the courts of record of the State of Illinois. Said bonds shall be issued and delivered simultaneously with the surrender, cancellation, satisfaction and release of a like amount of the judgment indebtedness which said bonds are issued to pay."

It further appears that at a regular meeting of the city council of the city of Chicago held on the 16th day of March, 1903, there was presented to the city council a petition, signed by ten legal voters of said city, ask-

ing the corporate authorities of said city to submit to the voters of the city, at the general election to be held therein on the 7th day of April, 1903, the question of issuing \$4,000,000 twenty-year three and one-half per cent bonds, for the purpose of raising a fund with which to pay and discharge the judgments theretofore rendered against said city in the Federal courts and the courts of record in the State of Illinois; that upon the presentation of said petition the city council duly passed an ordinance for the issue and sale of \$4,000,000 twenty-year three and one-half per cent bonds, under the provisions of section 1 of an act entitled "An act to amend an act approved April 27, 1877, entitled 'An act to amend an act entitled an act relating to county and city debts, and to provide for the payment thereof by taxation, in such counties and cities,' approved February 13, 1865, and to amend the title thereof," approved June 4, 1879, in force July 1, 1879, (Hurd's Stat. 1899, p. 1301,) which in part reads as follows: "That in all cases where any county, city, town, township, school district, or other municipal corporation, has issued bonds or other evidences of indebtedness, for money, or has contracted debts, which are the binding, subsisting legal obligations of such county, city, town, township, school district, or other municipal corporation, and the same, or any portion thereof, remain outstanding and unpaid, it shall be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation, upon the surrender of any such bonds or other evidences of indebtedness, or any number or portion thereof, to issue, in lieu or place thereof, to the owners or holders of the same, new bonds prepared as hereinafter directed, and for such amounts, upon such time not exceeding twenty years, payable at such place, and bearing such rate of interest, not exceeding seven percentum per annum, as may be agreed upon with the owners or holders of such outstanding bonds or other evidences of

indebtedness. \* \* \* And it shall also be lawful for the proper corporate authorities of any such county, city, town, township, school district, or other municipal corporation, to cause to be thus issued, such new bonds, and sell the same to raise money to purchase or retire any or all of such outstanding bonds or other evidences of indebtedness; the proceeds of the sales of such new bonds to be expended, under the direction of the corporate authorities aforesaid, in the purchase or retiring of the outstanding bonds or other evidences of indebtedness of such county, city, town, township, school district, or other municipal corporation, and for no other purpose whatever."

The ordinance contained the following preamble: "Whereas, the city of Chicago is indebted to divers persons on account of judgments heretofore recovered against the city of Chicago, which said judgments the city of Chicago desires to pay, and to that end to issue its negotiable bonds therefor pursuant to an act of the legislature of the State of Illinois approved February 13, 1865, and amendments thereto; and whereas, by a petition signed by ten (10) legal voters, resident therein, the corporate authorities of said city have been requested to submit to the voters thereof, at the next general election, the question of issuing such bonds to the amount of \$4,000,000." Section 3 reads as follows: "Said bonds shall be sold by the comptroller of the city of Chicago at a price not less than their face or par value, and the proceeds thereof shall be used for the exclusive purpose of canceling and retiring the like amount of indebtedness of the city of Chicago evidenced by judgments recovered against it in the Federal courts and in the courts of record of the State of Illinois. Said bonds shall be issued and delivered simultaneously with the surrender, cancellation, satisfaction and release of a like amount of the judgment indebtedness which said bonds are issued to pay."

The election was held on April 7, 1903, and the majority of all the votes cast were in favor of the proposition to issue \$4,000,000 twenty-year three and one-half per cent bonds. It also appears that the value of the taxable property in the city of Chicago for the last assessment for State and county taxes was \$402,495,131, five per cent (the debt limit) of which was \$20,124,756.

It is agreed that the judgments mentioned in the ordinance dated September 22, 1902, and the ordinance dated March 16, 1903, are the same judgments, and that the city does not intend to issue bonds in amount in excess of \$4,000,000.

The following statement made by Mark M. Foote, general accountant in the city comptroller's office, was introduced in evidence as defendants' "Exhibit 1.":

STATEMENT OF ALL DEBTS OF CITY OF CHICAGO SEPT. 30, 1903:

I. Bonds (general).....	\$6,963,000.00	
" (world's fair).....	4,517,000.00	
" (water).....	3,643,000.00	
		\$15,123,000.00
II. Judgments vs. city, unprovided for.....		4,871,182.83
III. Due special assessment fund.....	1,518,943.92	
public benefits due from city April 30, 1901, as per verbal report Haskins & Sells.....	1,744,347.02	
		3,263,290.94
IV. WATER FUND DEBT.		
Water certificates.....	750,000 00	
Water pipe extension certificates.....	462,657.43	
Accrued interest.....	47,660.24	
Outstanding warrants on treasurer and deposits.....	86,866.72	
		1,347,184.39
V. Anticipation tax warrants.....		4,093,000.00
VI. Due sinking funds.....		2,433,656.09
Portion included in this amount due sinking funds for which there is no provision by the city.....	\$1,384,049.87	
VII. Accrued interest (corporate).....	205,666.54	
Bonds and coupons matured, covered by deposit for payment of same.....	22,202.28	
Unpaid pay-rolls covered by funds with city paymaster..	368,027.66	
Due trust and special deposit funds, covered by cash with treasurer.....	514,813.08	
Warrants on city treasurer outstanding.....	512,772.90	
Due pension fund covered by cash in treasury.....	42,677.44	
		1,666,159.90
Total.....		\$32,797,474.15

ROBERT R. BALDWIN, for appellant:

An issue of bonds to refund old bonds or an existing debt increases the amount of municipal indebtedness. *Doon Township v. Cummins*, 142 U. S. 366.

The limit of indebtedness of the city of Chicago has already been exceeded, and the power does not exist at

this time to issue bonds in any amount. Const. of 1870, art. 9, sec. 12; Rev. Stat. chap. 24, art. 5, sec. 63.

The legislature has not conferred the power on the city to refund judgments, and the city, as an agency of government, has no other powers than those that are conferred or necessarily implied. *Cook County v. McCrea*, 93 Ill. 236; *Law v. People*, 87 id. 385; *Coquard v. Oquawka*, 192 id. 355.

Chapter 113 of the Revised Statutes of Illinois does not authorize the issue of the bonds in question. Judgments are not evidence of indebtedness, within the meaning of this section. *Ambler v. Whipple*, 139 Ill. 311; *Crum v. Sawyer*, 132 id. 443.

The city of Chicago has no authority, under the general law, to issue refunding bonds to take up judgments, because the power to borrow money is not incidental to its corporate powers. *Nashville v. Ray*, 19 Wall. 468.

The grant of power to borrow money for one year to pay judgments is an exclusion of a grant for any other term. *Expressio unius est exclusio alterius*. Coke's Litt. 210a; Broom's Legal Maxims, 505.

A corporate purpose for which money may be borrowed is a purpose specifically named by statute, and not any purpose deemed convenient by the officials of the city. *Drake v. Phillips*, 40 Ill. 388; *Taylor v. Thompson*, 42 id. 9; *County of Hardin v. McFarlan*, 82 id. 138; *Coquard v. Oquawka*, 192 id. 355.

When the statute points out a method to be pursued no other method is available. *Locke v. Davison*, 111 Ill. 19; *County of Hardin v. McFarlan*, 82 id. 138.

EDGAR B. TOLMAN, Corporation Counsel, (COLIN C. H. FYFFE, of counsel,) for appellees:

The city of Chicago has authority to issue bonds to pay its judgment indebtedness, either under the act of February 13, 1865, or under paragraph 5, section 1, article 5, of the City and Village act.

The act of 1865, as amended, applies to debts incurred after the passage of the act and to bonds issued to pay judgment indebtedness. Its provisions as to publication of notice of the election, at which the question of the bond issue was submitted to vote, was satisfied by a single publication. *Jenkins v. Pierce*, 98 Ill. 652; *Weld v. Rees*, 48 id. 432; *Cushman v. Stone*, 69 id. 530; *Magnusson v. Williams*, 111 id. 455; *Aldis v. Park Comrs.* 171 id. 424.

The city of Chicago has the power to issue the bonds under the provisions of clauses 5 and 6 of section 1, article 5, of the City and Village act. *Huron v. Bank*, 86 Fed. Rep. 272; *Insurance Co. v. Mead*, 13 S. D. 37; *Rogan v. Watertown*, 30 Wis. 257; *Quincy v. Warfield*, 25 Ill. 279; *Hyde Park v. Ingalls*, 87 id. 13; *Simonton on Mun. Bonds*, sec. 126.

PENCE & CARPENTER, counsel by leave of court:

The phrase "other evidences of indebtedness for money," used in section 1 of chapter 113 of the Revised Statutes, is broad enough to include a judgment debt. *Port Huron v. McCall*, 46 Mich. 565.

A judgment of record, even though rendered in an action of tort, is a debt contracted. 3 Blackstone's Com. 158-164; *Morse v. Tappan*, 3 Gray, 411; *Taylor v. Root*, 43 N. Y. 344; *Gray v. Bennett*, 3 Metc. 526; *Port Huron v. McCall*, 46 Mich. 565; Chitty on Contracts, (4th Am. ed.) 2.

The words "has contracted debts," in the foregoing act, are used by the legislature as expressing the same idea as do the words "has incurred liabilities." 2 Century Dic. 1231; Webster's Dic. 314.

Whenever the charter of a municipality contains express power and authority to issue bonds, the limitations upon that power and authority must be read out of the charter itself. The power once granted, the right to issue bonds for any corporate purpose exists, unless expressly or impliedly restricted by the charter itself. *Sutherland on Stat. Const.* secs. 408, 412; *Endlich on Interp. of Statutes*, sec. 108; *Port Huron v. McCall*, 46 Mich. 574.

The payment of judgment debts is a corporate purpose. *Taylor v. Thompson*, 42 Ill. 9; *Corwith v. Galena*, 48 id. 423; *Burr v. Carbondale*, 76 id. 475; *Morris v. Bank*, 84 id. 418; *Hyde Park v. Ingalls*, 87 id. 13; *Cairo v. Everett*, 107 id. 25; *Amy v. Galena*, 7 Fed. Rep. 156; *Weismer v. Douglass*, 64 N. Y. 91.

Section 3 of article 7 of the City and Village act does not limit the power of the city of Chicago to the borrowing of money for one year only, in order to pay off judgment debts. The clause there relating to judgments is a proviso attached to section 3, and applies only to those judgments rendered upon emergency contracts entered into by the municipality after the general appropriation bill has been passed. *Spring v. Olney*, 78 Ill. 101; *Bank v. Keith*, 84 Ill. App. 107; *Wolf v. Baueris*, 72 Md. 481; *In re Webb*, 24 How. Pr. 247; *Lehigh Co. v. Meyer*, 102 Pa. St. 479; *Cushing v. Warrick*, 9 Gray, 382; *Misch v. Russell*, 136 Ill. 22; *In re Partington*, 6 Q. B. 653; Endlich on Stat. Const. sec. 186; Sutherland on Stat. Const. secs. 222, 223.

To extend the operation of a proviso to other than the specific paragraph to which it is attached, the legislative intention so to do must be clearly expressed. Sutherland on Stat. Const. sec. 223; *Pearce v. Bank*, 33 Ala. 693; *Bank v. Collector*, 3 Wall. 495; *Bank v. United States*, 19 id. 227.

MR. CHIEF JUSTICE HAND delivered the opinion of the court:

It is first contended that as cities are given power to borrow money with which to pay judgments recovered against such municipalities by the last paragraph of section 3 of article 7 of the City and Village act, that method of raising funds with which to pay the judgment indebtedness of a city is exclusive. By section 1 of said article 7 it is provided that the fiscal year of cities shall commence at the date established by law for the annual election of municipal officers therein, or at such other

time as may be fixed by ordinance. By section 2, that city councils shall, within the first quarter of each fiscal year, pass an ordinance to be known as the annual appropriation bill, in which shall be specified such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporations, together with the objects and purposes thereof, and the amount appropriated for each object and purpose, and that no further appropriation shall be made at any other time within such fiscal year unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of the city, either by petition or at a general or special election. By section 3, that neither the city council nor any department or officer of the city shall have the right to add to the corporate expenses, in any one year, anything over and beyond the amount provided for in the annual appropriation bill for that year, and that no expenditure for any improvement to be paid for out of the general fund of the city shall exceed in any one year the amount provided for such improvement in the annual appropriation bill, but that the city council may by a two-thirds vote order any improvement, the necessity of which is caused by any casualty or accident happening after the annual appropriation has been made, and that the city council by a two-thirds vote may order the mayor and finance committee to borrow a sufficient amount to provide for the expense necessary to be incurred in making any improvement the necessity of which has arisen by reason of any casualty or accident which has happened since the annual appropriation has been made, for a space of time not exceeding the close of the next fiscal year, which sum, and the interest thereon, shall be included in the next general tax levy; and should any judgment be obtained against the city, the mayor and finance committee, under the sanction of the city council, may borrow a sufficient amount to pay the same, for a space

of time not exceeding the close of the next fiscal year, which sum and interest shall in like manner be added to the amount authorized to be raised in the general tax levy of the next year. And by section 4, that no contract shall be made by the city council, or any committee or member thereof, and no expense shall be incurred by any officer or department of the city, whether the object of the expenditure has been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except as otherwise provided by statute.

The sections of article 7 above referred to pertain to the annual expenditures of cities, and a method is provided therein whereby funds may be raised to meet the temporary pressing financial wants of such municipalities by a system of short loans, which in no event shall extend beyond the close of the next fiscal year. Those sections do not, in express terms or by implication, refer to or limit the powers of cities to borrow money on twenty-year bonds, conferred upon such municipalities by paragraph 5 of section 1 of article 5 of the City and Village act, or by section 1 of the act of 1865, as amended. Neither is the power to make the temporary loans provided for in article 7 inconsistent with the powers conferred upon cities under said other legislative enactments to make long time loans and issue bonds therefor, and from a consideration of all the legislation upon the subject it seems plain that cities have the power to issue twenty-year bonds for the purpose of obtaining funds for corporate purposes, and with which to raise money to retire outstanding bonds issued by or other indebtedness due from such municipalities, and that section 3 of article 7 of the City and Village act contains no limitation upon those powers, but that such powers are as full and complete as though said section 3 was not in force.

In the case of *City of Huron v. Second Ward Savings Bank*, 30 C. C. A. 38, (86 Fed. Rep. 272,) one of the objec-

tions made to a recovery upon the bonds sued upon was, that the power granted by the charter to the city council to pay current expense warrants of the city by a tax levy implies the exclusion of the power to fund such warrants by the issue of negotiable bonds. The court said: "The contention would be worthy of serious consideration if the express power to issue negotiable bonds was not also granted to the city council by this charter; but the charter grants to the council authority 'to appropriate money and provide for the payment of the expenses and indebtedness of the corporation,' and gives it both the power to levy taxes and the power to borrow money and issue bonds for this purpose. It cannot be that the grant of either of these powers excludes either, and the choice of the method by which the indebtedness of the city should be paid is left to the discretion of the council."

The question then arises, is the borrowing of money by the issuing of twenty-year bonds, from the sale of which a fund is to be raised wherewith to pay the judgment indebtedness of the city, the pledging of the city's credit, within the meaning of paragraph 5 of section 1 of article 5 of the City and Village act, for corporate purposes? Those purposes have been defined to be such purposes as are germane to the objects of the welfare of the municipality, or, at least, have a legitimate connection with those objects and a manifest relation thereto. *Anderson's Law Dic.* p. 265; *Board of Supervisors of Livingston County v. Weider*, 64 Ill. 427; *People v. Dupuyt*, 71 id. 651; *Burr v. City of Carbondale*, 76 id. 455.

In *Taylor v. Thompson*, 42 Ill. 9, a tax for a corporate purpose was said to be one to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it.

In *National Life Ins. Co. v. Mead*, 13 S. Dak. 37, suit was commenced to compel the treasurer of the city of Pierre to pay certain interest coupons. One defense was, that the city was without power to issue funding bonds. The

statute under which the bonds were issued was identical with paragraph 5 of section 1 of article 5 of the City and Village act of this State. The court said (p. 43): "It will be observed that this law gives express power to borrow money by issuing bonds for corporate purposes. Did this confer power to issue bonds for the purpose of funding the floating indebtedness? An affirmative answer to this inquiry is supported by the following decisions: *Morris & Whitehead v. Taylor*, (Ore.) 49 Pac. Rep. 660; *City of Huron v. Second Ward Savings Bank*, 30 C. C. A. 38; 86 Fed. Rep. 272; *Portland Savings Bank v. City of Evansville*, (C. C.) 25 Fed. Rep. 389. \* \* \* The statute expressly makes the power to issue bonds co-extensive with the power to borrow money. Either may be exercised for any corporate purpose, and the payment of legal municipal debts is clearly a corporate purpose. If a city has power to borrow money by issuing bonds for the purpose of lighting its streets, it clearly has power to borrow money in the same manner to pay an indebtedness incurred for the same purpose. Had the legislature contemplated there would be no floating indebtedness under any circumstances, cities would have been authorized to borrow only for the purpose of paying outstanding bonds. We think the city was authorized to issue bonds for the purpose of funding its indebtedness."

In *City of Huron v. Second Ward Savings Bank*, *supra*, which was a suit to recover upon municipal bonds, the court said: "Another objection to these bonds is, that the city of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the city of Huron is plenary. It was general—not special. It was not limited to specific purposes, but was to borrow money and issue bonds for all municipal purposes. It was 'to borrow money, and for that purpose to issue bonds of the city in such denominations, for such length of time not to exceed twenty years, and bearing such rate of interest

not to exceed seven per cent per annum, as the city council may deem best.' The whole is greater than any of its parts, and includes them all. The power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund the indebtedness of the municipality."

If it be a corporate purpose, as we think it is, to issue and sell twenty-year bonds to pay the judgment indebtedness of a city, the bonds in question may be issued under the authority of paragraph 5 of section 1 of article 5 of the City and Village act, notwithstanding that the same power may be conferred by the act of February 13, 1865, as amended, as that act upon its face does not in any way purport to be exclusive. The power given by paragraph 5 of section 1 of article 5 of the City and Village act is a general power, and although other acts may confer on cities and villages the power to issue bonds, the general power conferred upon cities by the City and Village act is not thereby taken away.

If the city has power to issue the bonds the issue and sale of which are sought to be enjoined, by virtue of paragraph 5 of section 1 of article 5 of the City and Village act, a consideration of the power of the city under the act of 1865, as amended, to issue said bonds would seem to be unnecessary. We have, however, thought it best briefly to examine the power of the city, under that act, to issue said bonds.

As preliminary to the question of the right of the city to issue said bonds under the act of 1865, as amended, it is said the notice of the election should have been published for three successive weeks, instead of once, as was done, and the ballot used at the election was not in the form prescribed by the statute. Under the authority of *Weld v. Rees*, 48 Ill. 428, and *Jenkins v. Pierce*, 98 id. 646, the notice was sufficient; and the only criticism made upon the form of the ballot is, that it contained more, rather than less, than the law required. The ballot was

in form substantially like the one prescribed by the statute, and was sufficient.

It is next contended that a judgment does not fall within the designation "other evidences of indebtedness issued for money," within the meaning of the language used in the act of 1865, as amended, and does not, therefore, fall within the purview of that statute. One authority, only, in point,—that of *City of Port Huron v. McCull*, 46 Mich. 565,—has been cited upon the proposition that judgments are within the meaning of the language used in that statute. The city of Port Huron had issued its bonds in aid of the construction of the Port Huron and Lake Michigan railroad. Default was made and judgment was rendered for the amount thereof against the city. New bonds were issued, and said judgment indebtedness was refunded under the provisions of the following section of the city charter: "No loan, bond or other evidence of debt not expressly authorized by this act, or any act hereby continued in force, shall be made or issued by the common council or any board or officer of the corporation: *Provided, however*, that the common council, subject to the approval of the board of estimates, may issue new bonds for the refunding of bonds and evidences of indebtedness already issued." The new bonds having matured and default having been made in the payment thereof, suit was brought thereon, and the city defended on the ground that the judgment was not evidence of debt already issued, and that the city council was therefore without power to issue said bonds under the foregoing section of its charter, with which to refund said judgment. The trial court overruled the city's contention, and its judgment was affirmed by the Supreme Court. Judge Cooley, in speaking for the court, in part said: "It is also said that refunding bonds may be issued only for the refunding of 'bonds and evidences of indebtedness already issued,' and a judgment is not an evidence of indebtedness issued. A judg-

ment is the act of a court; but the refunding provision intends the obligations which the city itself has issued as evidences of its indebtedness, the bonds, notes, etc.; and this view is strengthened by the following section, (sec. 12, p. 231,) which provides that 'all bonds and evidences of debt, when refunded, shall be canceled and destroyed by the treasurer, in the presence of the comptroller and a special committee of the common council appointed for that purpose. He shall record and keep an accurate description of all bonds and evidences of debt thus canceled and destroyed.' A judgment, it is said, cannot be thus canceled and destroyed. \* \* \* This view of the statute is \* \* \* very narrow and technical. \* \* \* It is easy to say that a judgment is not an evidence of indebtedness issued, but it is just as easy to say the contrary, and with quite as good reason. A judgment is not only an evidence of indebtedness, but it is of the highest and most conclusive nature. And there is no straining of language in saying that the judgment is issued. \* \* \* And what difficulty there can be in canceling and destroying a judgment I do not understand. The utterance of the judge pronouncing it cannot be destroyed; the book in which it is entered is to be preserved as a perpetual record; but the judgment as an evidence of indebtedness is canceled when it is paid and receipted. \* \* \* There is a principle of law that municipal powers are to be strictly interpreted; and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted; but when a power is conferred which in its exercise concerns only the municipality and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view to narrowing its construction."

The reasoning found in the opinion in that case is satisfactory and convincing, and conclusive of the right of the city of Chicago to issue said bonds under the act

of 1865, as amended, to raise a fund from the sale thereof, with which to pay its outstanding judgment indebtedness. The bonds, when issued, will be no less valid by reason of the fact that they may properly be issued under either act,—that is, under paragraph 5 of section 1 of article 5 of the City and Village act, or under the act of 1865, as amended.

We will next consider the indebtedness of the city of Chicago, with the view of determining whether the issue of said bonds is prohibited by the constitutional prohibition which fixes the limit of said indebtedness at an amount not to exceed five percentum of the value of the city's taxable property, as shown by the last assessment for State and county taxes. This will be done, taking defendants' "Exhibit 1" as a basis.

Item I.—In item 1 of said exhibit appears, "Bonds (world's fair) \$4,517,000." These bonds were issued under section 13 of article 9 of the constitution of 1870, which section was adopted as an amendment to the constitution in the year 1890. The funds arising from the sale of said bonds were used in aid of the World's Columbian Exposition. At the time the amendment was adopted the city was in debt beyond the constitutional limit, and the object of the amendment was to confer upon the city power to issue said bonds notwithstanding the constitutional limit of five per cent. It is therefore clear that said bonds should not be taken into consideration in determining the amount of the city's indebtedness under the debt limit of five per cent fixed by the constitution.

Item II.—An elaborate argument has been presented by the solicitor for appellee with a view to induce the court to hold that the item, "Judgments *vs.* city, unprovided for, \$4,871,182.83," should not be included in the computation in ascertaining how much the indebtedness of the city is with reference to the constitutional limitation. In *City of Chicago v. McDonald*, 176 Ill. 404, it was held that judgments were debts against the city, and that

the amount thereof should be computed in ascertaining whether the constitutional limitation had been exceeded. We are not disposed to recede from the position taken in that case.

Item III.—The amount, "Due special assessment fund, \$1,518,943.92," is money held by the city treasurer with which to pay assessment warrants when presented, and is in no sense a debt of the city. The amount of "Public benefits due from city April 30, 1901, as per verbal report Haskins & Sells, \$1,744,347.02," represents the amounts which the city has been assessed for public benefits in numerous assessment cases and which remain unpaid, and under the authority of *Jacksonville Railway Co. v. City of Jacksonville*, 114 Ill. 562, is not a debt of the city in the sense of the constitutional limitation.

Item IV.—The "Water fund debt," amounting to \$1,347,184.39, is an indebtedness of the city. *City of Joliet v. Alexander*, 194 Ill. 457.

Item V.—The amount of "Anticipation tax warrants, \$4,093,000.00," under the authority of *City of Springfield v. Edwards*, 84 Ill. 626, is not, in the constitutional sense, a debt of the city.

Item VI.—The evidence shows that \$1,049,606.22 is the total amount in the city treasurer's hands which can be properly applied for sinking fund purposes. The item, "Due sinking funds, \$2,433,656.09," is not a debt of the city, but the amount in the hands of the city treasurer belonging to the sinking fund should be deducted from the amount of the city's bonded indebtedness other than world's fair bonds. *Rice v. City of Milwaukee*, 100 Wis. 516; *Kelly v. City of Minneapolis*, 63 Minn. 125.

Item VII.—This item represents the floating indebtedness of the city and the money with which to pay the same, with the exception of "Accrued interest (corporate), \$205,666.54," is in the city treasury. The "accrued interest" item is a debt. The other items are not debts of the city within the constitutional limitation.

We conclude, therefore, that the following items found in said "Exhibit 1" in a constitutional sense constitute the debts of the city and must be taken into account in determining its debt limit:

I. Bonds (general).....	\$6,963,000.00	
"    (water).....	3,643,000.00	\$10,606,000.00
II. Judgments vs. city, unprovided for.....		4,871,182.83
IV.                   WATER FUND DEBT.		
Water certificates .....	\$750,000.00	
Water pipe extension certificates.....	462,657.43	
Accrued interest.....	47,660.24	
Outstanding warrants on treasurer and deposits.....	86,866.72	
		1,347,184.39
VII. Accrued interest (corporate).....		205,666.54
		\$17,030,033.76
From which must be deducted the cash sinking fund on hand .....		1,049,606.22
Total indebtedness.....		\$15,980,427.54

From the foregoing statement it appears that the issue of the \$4,000,000 bonds sought to be enjoined would not increase the indebtedness of the city of Chicago beyond the sum of \$20,124,756, its constitutional debt limit.

The position has been taken by appellees that even though the city were found to be indebted beyond the limit prescribed by the constitution, nevertheless the issue of the bonds in question would be valid for the reason that their issue does not increase the indebtedness of the city of Chicago, as the ordinances authorizing their issue provide, "said bonds shall be issued and delivered simultaneously with the surrender, cancellation, satisfaction and release of a like amount of the judgment indebtedness which said bonds are issued to pay." In view of the fact that the indebtedness of the city does not exceed its debt limit within the meaning of the constitution, the question thus raised has not been considered and no opinion with reference thereto is expressed.

The decree of the circuit court of Cook county will be affirmed.

*Decree affirmed.*

HENRY YATES, Insurance Superintendent,  
v.  
THE CONTINENTAL INSURANCE COMPANY.

*Opinion filed February 17, 1904.*

1. PLEADING—*decree pro confesso follows sustaining of exceptions to answer.* Upon the sustaining of the exceptions to the sufficiency of the answer to a bill in chancery a decree *pro confesso* upon the bill follows as a matter of course, if the portion of the answer not excepted to presents no material issue and the defendant makes no further answer.

2. INSURANCE—*superintendent of insurance may file cross-bill to enjoin company from continuing business.* Upon a bill to enjoin the superintendent of insurance from refusing to grant to complainant the usual rights of an insurance company, the defendant may, by cross-bill, ask for an injunction to restrain the complainant from further prosecuting the insurance business.

APPEAL from the Superior Court of Cook county; the Hon. AXEL CHYTRAUS, Judge, presiding.

This is a bill in chancery, filed on January 23, 1903, in the superior court of Cook county by the Continental Insurance Company against Henry Yates, as insurance superintendent of Illinois, which, as originally filed and as amended, prayed that said Yates should be enjoined from setting out by letter, or otherwise causing to be published, any statement derogatory to the interests of complainant, and denying that complainant is licensed by the department of insurance of Illinois, or by him, or by any means or manner saying or doing anything, which may tend to induce the insurance department, or other citizens of this State, to believe that complainant is not fully authorized to transact the business of insurance in the State of Illinois, and from in any manner refusing to grant to complainant the same privileges, as are by him and by the custom of his office granted and accorded to other insurance companies, organized under the laws of Illinois, and transacting business therein. The bill sets out the acts of the legislature, mentioned in the petition

for *mandamus* in the case of *Yates v. People ex rel.* (ante, p. 316,) and makes substantially the same allegations, as are made in said petition for *mandamus*, except that, in addition thereto, the bill here alleges that the insurance superintendent had written certain letters to parties making inquiries of him, stating that the Continental Insurance Company had no authority from the insurance department to transact business, and that no license or authority had been issued by the department to it to carry on the insurance business. The bill was answered by appellant, the insurance superintendent, admitting that the letters complained of were written, and making substantially the same allegations, as were made in the answer to the petition for *mandamus* in the other case. In the case at bar, the insurance superintendent in his answer and amended answer, and amendment to the amended answer to the bill, sets up that said insurance company has for a period of more than one year ceased to transact the business for which it was organized, and that its charter should be deemed and held extinct in all respects as if it had expired by its own limitation, and that the court should fix the time within which said corporation should close its concerns; and that, on or about the year 1887, the company ceased to transact any business whatever for which it was organized, and remained out of business for sixteen years thereafter, and, after it ceased to do business, did no business whatever under its charter, except as set out in the answer and amended answer, and then and there thereby abandoned its charter, and ceased for a period of sixteen years prior to the beginning of this suit to exercise any of the corporate powers granted to it by its charter, etc. The insurance superintendent also filed a cross-bill, an amended cross-bill and an amendment to the cross-bill, setting up the same allegations as to the cessation of business and abandonment of the charter as are specified in the answer, and praying in said cross-bill, as originally filed

and as amended, that the defendant below, the Continental Insurance Company, should be enjoined from further proceeding with its business, and asking for a receiver. The Continental Insurance Company filed a demurrer to the answer and the cross-bill of the superintendent, demurring to so much thereof, as stated that said corporation had for a period of more than one year ceased to transact the business for which it was organized, and that its charter should be deemed as extinct, etc. The company also filed an answer to so much of the cross-bill as was not demurred to. Subsequently, the company filed a general demurrer to the cross-bill as amended.

On March 4, 1903, the Continental Insurance Company filed exceptions to the answer of appellant to the bill of complaint, and one of the exceptions was, that "defendant does not set up any matter constituting a defense to the matters alleged in the bill."

On March 17, 1903, it was ordered, on motion of appellee's solicitor, that the exceptions, filed by appellee to appellant's amended answer to the original bill, and to such amended answer as amended, be sustained, to which there was objection and exception by appellant; and, at the same time, it was ordered that the demurrer to the amended cross-bill as amended be sustained. Thereupon, upon final hearing, the cross-bill was dismissed for want of equity, to which there were objection and exception by the cross-complainant; and it was further ordered, adjudged and decreed that the original bill, as amended, be taken for confessed as against appellant, and that he, as insurance superintendent, be enjoined in accordance with the prayer of the bill and amended bill. The present appeal is prosecuted from the decree so rendered by the court below.

FRED H. ROWE, for appellant.

J. H. WESTOVER, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The questions in this case are substantially the same as the questions already discussed and disposed of in the case of *Yates v. People ex rel.* (*ante*, p. 316). The exceptions, filed to the amended answer as amended in the present case, were in the nature of a special demurrer to the answer. (*Story v. Livingstone*, 13 Pet. 359; *Stone v. Moore*, 26 Ill. 165). By sustaining the exceptions to the answer, the court held that the defense set up in the answer was insufficient. That defense was, that the charter of appellee had become extinct for the reason stated in *Yates v. People ex rel. supra*. In the brief filed in this case for appellee, it is said: "The only question, which arises in this case, is whether under the act of the legislature of the State of Illinois entitled 'An act in regard to the dissolution of insurance companies,' approved July 1, 1874, the charter of the appellee is extinct." As this question is decided in the other case, it is not necessary to re-discuss it here. We have held that, where exceptions to an answer are allowed, and the remainder of the answer presents no material issue, and the defendant makes no further answer, it is proper to decree that the petition or bill of the complainant be taken as confessed for want of an answer. (*Work v. Hall*, 79 Ill. 196; *Craig v. People*, 47 id. 487; *Bauerle v. Long*, 165 id. 340). The trial court having allowed the exceptions to the answer as having been well taken, the decree *pro confesso* upon the original bill followed as a matter of course, the appellant having failed to file a further answer, and having stood by the answer, to which the exceptions were sustained. But, for the reasons stated in the other case, we are of the opinion that the defense set up in the answer was a good one, and that the court erred in sustaining the exceptions to the answer, and in entering a decree in accordance with the prayer of the original bill.

We are also of the opinion that the court erred in dismissing the amended cross-bill as amended, for want of equity. Section 3 of "An act to provide for the establishment of an insurance department and the appointment of an insurance superintendent," approved June 20, 1893, in force July 1, 1893, provides as follows: "The insurance superintendent shall possess and have all the powers, and he may perform all the duties in regard to the business of insurance in this State, which are now attached by law to the office of Auditor of Public Accounts, and the Attorney General. And he shall exercise the same control over the insurance companies, their officers and agents in this State, \* \* \* and may institute and prosecute in his name all suits and do all things heretofore required to be done by the laws of this State by the Auditor of Public Accounts, and the Attorney General." Under the act of July 1, 1874, entitled "An act in regard to the dissolution of insurance companies," in force July 1, 1874, the State Auditor had the right to file a bill asking for an injunction to restrain the company from further prosecuting its business; and, therefore, the present appellant, as insurance superintendent, had the same right which was by the last named act vested in the State Auditor. We see no reason why the insurance superintendent could not file his cross-bill in the present suit, asking for an injunction to restrain the company from further prosecuting its business. A receiver also should have been appointed under the cross-bill, as provided in section 5 of said act of July 1, 1874.

Accordingly, the decree of the court below sustaining the exceptions to the amended answer as amended, and granting the relief asked by the original bill, and dismissing the cross-bill for want of equity, is reversed, and the cause is remanded to the superior court of Cook county with directions to proceed in accordance with the views herein expressed.

*Reversed and remanded.*

HENRY HERSCHBACH

v.

WILLIAM L. COHEN.

207 517  
e115a\*855*Opinion filed February 17, 1904.*

1. *RES JUDICATA*—when judgment in trespass *quare clausum fregit* is a bar to ejectment. A judgment in an action of trespass *quare clausum fregit* is *res judicata* in a subsequent ejectment suit between the same parties involving the same land, where a plea of *liberum tenementum* was filed in the trespass suit, and it is shown that the main question tried in such suit was the ownership of the land or the location of the true boundary thereof as between the parties.

2. *SAME*—fact that party is entitled to a second trial in ejectment does not prevent trespass judgment from being *res judicata*. The fact that a party may, under the statute, pay the costs and have a new trial in ejectment does not prevent a judgment in trespass *quare clausum fregit*, wherein the title to the same land was the main issue involved between the same parties, from being pleaded as *res judicata*.

3. *PLEADING*—what a sufficient averment of ownership by plaintiff in trespass *quare clausum fregit*. An allegation in a declaration in a general action of trespass *quare clausum fregit* that defendant destroyed timber of the plaintiff growing "upon certain lands of the plaintiff," is a sufficient averment of ownership to put the ownership in issue under a plea of *liberum tenementum*.

APPEAL from the Circuit Court of Randolph county; the Hon. R. D. W. HOLDER, Judge, presiding.

This is an action of ejectment, begun on August 24, 1903, in the circuit court of Randolph county by the appellant against the appellee. The trial, which was before the court without a jury, resulted in a judgment entered on September 24, 1903, in favor of the defendant below, appellee here, and against plaintiff below, appellant here, for costs of suit. The present appeal is prosecuted from the judgment so entered.

The property, which appellant claims in fee, is described as follows, to-wit: Surveys 222 and 223, claims 1287 and 1288, in the common fields of Kaskaskia, in township 7 south, ranges 7 and 8 west, in the county of Randolph.

Plaintiff below introduced in evidence a deed, dated October 14, 1893, executed to him by a special master in chancery of Randolph county, which deed was issued in pursuance of a decree, entered at the September term, 1893, of the circuit court of that county in a partition suit, and which deed recites that the premises therein described, to-wit, surveys 222 and 223, above set forth, were sold to Henry Herschbach for the sum of \$2755.00. Plaintiff below also introduced a certain plat of said surveys, drawn by the county surveyor, showing total length of the south line of survey 222 to be 186 chains, and showing both surveys to contain 164.80 acres, which survey was made July 3, 1902; also copy of the government field notes of Randolph county, showing copy of plats and original government field notes of said surveys, showing metes and bounds description, and showing the Mississippi river as the western boundary of the surveys; and also a copy of the government field notes of said county, showing said surveys, the common fields of Kaskaskia, and the accretions, known as Burch's Island, and showing the south line of survey 222 to be 186 chains, etc. Upon the trial below the plaintiff introduced two witnesses, who were examined orally.

The defendant below, appellee here, introduced in evidence the declaration, pleas, instructions, verdict, judgment, and other proceedings in a certain trespass suit, brought to the September term, 1902, of said court by the present appellant, Herschbach, against the present appellee, Cohen. In the trespass suit the declaration charged that the defendant, Cohen, cut and destroyed the timber of the plaintiff of the value of \$500.00, "then growing and being in and upon certain lands of the plaintiff there situate, being part of surveys 222 and 223, \* \* \* and took and carried away the said \* \* \* timber and converted and disposed of the same to his own use," etc. To the declaration in the trespass suit two pleas were filed, one, a plea of not guilty, and the other,

a plea of *liberum tenementum*. In the latter plea it was set up, "that the close in the said declaration mentioned, and in which, etc., now is and at the time when, etc., was the close, soil and freehold of the defendant." The instructions in the trespass suit instructed the jury as to the boundary line between adjoining owners on the island and mainland, and as to the location of the slough, claimed to be the boundary line between the two tracts, and as to its change of position by reason of the change in the bed or current of the river. The trial in the trespass suit was before a jury, and the jury therein returned a verdict on September 15, 1902, finding the defendant therein, the present appellee, not guilty. Motion for a new trial in the trespass suit was overruled, and judgment was rendered in favor of defendant on the verdict and against the plaintiff therein, the present appellant, for costs of suit.

Upon the trial below of the present ejectment suit, the following stipulation was made between the parties: "It is admitted that the land, sued for in this case, is the same land that was involved in an action in trespass commenced by Mr. Herschbach, the plaintiff, against Cohen, the defendant, which was finally disposed of at the September term, 1902, of this court; it is agreed that, when all the evidence is in on this question of former adjudication, if the court holds that the plea of former adjudication is not a defense in this suit, then judgment shall pass for the plaintiff, with right to a new trial according to the statute, or appeal if desired." It is not denied on the part of the appellee that the appellant herein is the owner of the said surveys numbered 222 and 223; and it is not denied, on the part of the appellant, that the appellee is the owner of said island, lying west of the western boundary of said surveys.

It was proven that, upon the trial of the trespass suit, "both plaintiff and defendant introduced evidence to locate the boundaries of the two claims and surveys, num-

bered 222 and 223, and to locate the slough, as it was at the time the government surveyed these surveys, and to locate it, as it was at the time of the trial of that suit; and that the object of the evidence was to ascertain whether the timber cut was cut on the land of the plaintiff, or of the defendant, in that cause; that the plaintiff and defendant in that suit were respectively the plaintiff and defendant in this suit; that the plaintiff made preliminary proof of the fact, that the timber was cut, and that it was cut on the land between the two sloughs, shown on 'Exhibit A' introduced in this case, which is the same plat used in that case; that the defendant did not deny the cutting of the timber, but that there was some little evidence as to the value of the timber cut; that the great bulk of the evidence of numerous witnesses was as to where that slough was at the time of the government survey, and where it was at the time of the trial of the case, plaintiff contending that it never had moved, and defendant contending that it had moved to the point 'A' on exhibits 1 and 2."

The land, here in controversy, is 18.24 acres lying between two sloughs, or arms of the Mississippi river, appellant contending that his land extended as far as the westernmost slough called in the evidence the "original slough," and appellee claiming that appellant's land only extended as far as the easternmost of the two sloughs, marked "1-2," the land between the two being 18.24 acres.

R. E. SPRIGG, and A. E. CRISLER, for appellant.

H. CLAY HORNER, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The defense, made by the appellee upon the trial below, was that the judgment in the trespass suit between the same parties was *res judicata* as to the title involved in this suit. The trial court sustained the defense, so

made by appellee, and entered judgment accordingly. The question of law, presented by the record, is this: if, in an action of trespass *quare clausum fregit*, the defense pleaded is *liberum tenementum*, can the judgment therein rendered be set up as *res judicata*, when an attempt is afterwards made to establish title in another proceeding between the same parties, the close described in the second action being the same as that described in the first?

It appears from the statement of facts preceding this opinion that, in the trespass suit, the plea of *liberum tenementum* was filed. It also appears from the testimony that, upon the trial of the trespass suit—which was brought to recover damages for the cutting of timber upon the land claimed by the appellant—the defendant therein, the present appellee, did not deny the cutting of the timber, but that the object of the evidence in the trespass suit was to ascertain whether the timber cut was cut on the land of the plaintiff in that suit, the present appellant, or upon the land of the defendant in that suit, the present appellee. It appears, therefore, that the main issue tried in the trespass suit was as to the ownership of the same portion of the surveys as is here in controversy, or, perhaps, as to the location of the western boundary line of the two surveys, owned by the present appellant.

It is not necessary to say, nor do we so hold, that the judgment rendered in the trespass suit is necessarily conclusive as to what appears from the record, but it may be shown by parol, and it has been here shown by parol, what was involved in the issues made by the pleadings in the trespass suit, and what actually came in question upon the trial of that suit. This being so, we see no reason why the plea of *res judicata* was not a good defense, and why the action of the trial court in sustaining it was not correct.

We have held that the plea of *liberum tenementum* is a proper plea in an action of trespass *quare clausum fregit*,

and that it is error to instruct the jury to disregard the same when pleaded; that the plea, as one of confession and avoidance, in legal effect admits such a possession in the plaintiff as would entitle him to maintain an action against a wrongdoer, and asserts a freehold in the defendant with a right to immediate possession as against the plaintiff. (*Fort Dearborn Lodge v. Klein*, 115 Ill. 177.) In *Dean v. Comstock*, 32 Ill. 173, this court, speaking through Mr. Justice BREESE, said (p. 179): "Trespass being a possessory action, it is not at all necessary that the right should come in question. But if it does come in question, as it did in this case, by the plea of *liberum tenementum*, and the defendant has shown, as he did show, that he owned the premises in fee, he cannot, on any principle of law with which we are acquainted, be rendered responsible to a person having neither a right to the property nor to the possession."

We have held that, where in an action of trespass *quare clausum fregit* the defense pleaded is *liberum tenementum*, the judgment rendered upon the issue thereby made will not be regarded as conclusive, yet it may be shown by parol evidence, or otherwise, that the question of title was actually tried and passed upon in the action of trespass; and that such a judgment is necessarily conclusive as to what appears from the record, or is shown by parol to have been involved in the issues, made by the pleadings in the suit, and to have actually come in question on the trial. (*Elson v. Comstock*, 150 Ill. 303; *Rhoads v. City of Metropolis*, 144 id. 580.)

If, in an action of trespass *quare clausum fregit* to recover damages for the cutting of timber upon the plaintiff's land, the plea is the general issue, or not guilty, and the defendant denies that he cut the timber, then the issue is one of fact, presented to the jury, as to whether or not the defendant did cut the timber, and as to how much the defendant should pay as damages for the timber so cut. In the case of such an issue in the action of

trespass, the judgment of course decides nothing as to title. If, however, the defendant in the action of trespass, so brought, admits that he cut the timber, but claims that he had the right to do so because the land was his own land, then an issue is made as to the ownership of the land. The ownership of the land must be determined, in order to decide whether the defendant had the right to cut the timber or not. In the case of such an issue being made the question of ownership or title is directly involved, and where the testimony shows that it was so involved, we see no reason why the judgment rendered cannot be pleaded as *res judicata* in any subsequent proceeding between the same parties, involving the title to the same land. In *Hawley v. Simons*, 102 Ill. 115, we said (p. 118): "A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles and rights involved in the litigation and passed upon by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them." In the case at bar, the parties in the trespass suit were exactly the same parties as the parties in this ejectment suit, and the issue, as has already been shown, in the trespass suit was the same as the issue here, to-wit, the ownership of the 18.24 acres of ground between the two sloughs, mentioned in the statement preceding this opinion. The appellant, plaintiff below, "admitted that the land sued for in this case is the same land that was involved in an action of trespass commenced by Mr. Herschbach, the plaintiff, against Mr. Cohen, the defendant." This disposes of the contention, made by the appellant, that a judgment in trespass *quare clausum fregit*, where the issue relates only to a particular spot of the premises described

in the declaration without evidence as to the exact locality of the trespass, cannot conclude either party as to the question of title. (2 Waterman on Trespass, sec. 1119.) In the case at bar, the evidence does show the exact locality of the trespass, not only by virtue of the admission above set forth, but by reason of the oral testimony, which shows that the timber was cut on the land between the two sloughs, that is to say, the 18.24 acres. It follows that the trespass is exactly located, as having occurred upon the 18.24 acres here involved.

Even if the question, involved in the trespass suit, was merely a question of the true boundary between the land of the appellant and the land of the appellee, yet the evidence shows that that question was decided in the trespass suit in favor of the present appellee; and the judgment in the trespass suit must be regarded as *res judicata* as to the question of boundary. In *Mueller v. Henning*, 102 Ill. 646, where a decree, on a bill to correct a mistake in the description of land in a deed, found that the place, at which the survey was commenced, was not the correct one, but that the survey should have commenced at another point, it was held that, in an action of ejectment between the parties, the question of boundary was *res judicata*, and the decree was conclusive upon them as to its correctness. A judgment, in an action brought solely to determine a boundary line, although brought in the form of an action of trespass to try title, is *res judicata*. (24 Am. & Eng. Ency. of Law,—2d ed.—p. 825, and cases recited in note).

"Where, in an action of trespass, the title is actually in issue, and that is a part of that upon which the judgment is based, and the plaintiff prevails, it is conclusive as against an action of ejectment." (21 Am. & Eng. Ency. of Law, pp. 244, 245, and cases in notes).

Freeman in his work on Judgments, (vol. 1, 4th ed. sec. 311,) after referring to the conflict among the decisions in the various States upon this subject, says:

"The title cannot in some of the States be regarded as in issue except upon a special plea of soil or freehold, or some other equivalent pleading; but when such plea is interposed, or when without any special plea the rules of practice in the State permit the title to be received in evidence and to be considered by the court or jury, and it is in fact received, considered and made the basis of a verdict and judgment, then that is as conclusively settled, as if it had been drawn in question and decided in some other action." This language applies exactly to the course of decision in this State, and to the facts in the case at bar. Here, a special plea of soil or freehold, to-wit, the plea of *liberum tenementum*, was filed in the action of trespass, and the proof shows that the title was received in evidence in the action of trespass, and considered, and made the basis of the verdict and judgment therein.

Waterman, in his work on Trespass (vol. 2, sec. 1119,) speaking of the action of trespass *quare clausum fregit*, says: "Yet the title may be litigated as a matter directly involved in the issue, and when that question is adjudicated and a judgment rendered in this form of action by a court of competent jurisdiction, the judgment will conclude the parties, and operate as an estoppel if the matter appears on the face of the record, or as evidence conclusive in relation to the title, in any subsequent litigation of the matter between them. But when the defendant in ejectment seeks to show title in himself to the premises in dispute by means of the estoppel, created by the recovery in the former action, he is bound to show affirmatively that the title to those premises was passed upon in that action. When it has been apparently necessary to pass upon that question before the judgment could have been given, the record will be *prima facie* evidence for the defendant, and will be conclusive as an estoppel against the plaintiff, unless evidence has been given on his part to contradict and overcome this presumption."

Wells, in his work on *Res Adjudicata* and *Stare Decisis*, (sec. 287), says: "Where a plaintiff brings an action of trespass *quare clausum fregit*, and the defendant under the general issue litigates the question of title, and the verdict on that issue is rendered against him, and afterward the plaintiff brings a direct action to try the title, the former judgment will be conclusive, and the defendant will not be allowed to dispute the title."

Counsel for appellant lay great stress upon the case of *Keyser v. Sutherland*, 59 Mich. 455, where it was held by the Supreme Court of Michigan, that a judgment in trespass cannot be a bar to a subsequent ejectment suit for the same premises, even though the parties in both suits are the same, upon the ground that a party is entitled to but one trial, as a matter of right, in Michigan in an action of trespass, while in ejectment, upon the payment of costs of the first trial, he has an absolute right to another trial; and it is said that the statute, allowing a second trial in an action of ejectment upon the payment of costs, is substantially the same in Illinois as in Michigan. What is said upon this subject in *Keyser v. Sutherland*, *supra*, is mere dictum, as it appeared that the title was not passed upon in the action of trespass. But, independently of this consideration, we are not disposed to accept the reasoning of the Michigan court upon this subject as sound. The statute of Illinois provides that at any time within one year after a judgment, either upon default or verdict, in the action of ejectment, the party, against whom it is rendered, his heirs or assigns, upon the payment of all costs recovered therein, shall be entitled to have the judgment vacated, and a new trial granted in the cause. (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1621). This is so, no matter what the defense may have been upon the first trial of the cause. In the Michigan decision referred to, the court says that it will not allow the right to two trials in ejectment to be taken away by allowing one trial in trespass to be

used as a former adjudication. We see no reason why the result here deplored should necessarily follow. The fact, that, upon the first trial of the ejectment suit, the judgment in the trespass suit is pleaded as *res judicata*, does not deprive the defeated party of a second trial in the ejectment suit. There might be other defenses upon the first trial of the ejectment suit equally as good as the defense of *res judicata*, and yet, if the defeated party chooses to pay up the costs within the time specified, and take his chances upon a new trial, he has a right to do so. The character of the defense, made on the first trial, does not deprive him of his right to a new trial. Any defense, made upon the first trial, if good and valid and supported by the evidence, whether the defense of *res judicata* or something else, would lessen the probability of the defeated party's success upon a second trial if the same defense is set up in the second trial, but in no way interferes with his right to such second trial.

It is said by counsel for appellant, that the declaration in the action of trespass does not aver that the plaintiff therein was the owner of the premises. The declaration in the trespass suit avers that the defendant destroyed the timber of the plaintiff, then growing "upon certain lands of the plaintiff." This averment is the usual one, which is made in declarations in trespass *quare clausum fregit*. The cases in Illinois, referred to by counsel for appellant, which require the plaintiff in actions, brought to recover damages for cutting timber, to aver that he is the owner of the land, upon which the timber is cut, were cases arising under a special statute, imposing a penalty for cutting timber. This statute, which was entitled "An act to prevent trespassing by cutting timber," provided that any person, who cuts trees growing upon land belonging to another person without first having obtained permission so to do from the owner of such land, should forfeit and pay for each tree a certain penalty therein named; and it was held in the cases re-

ferred to by counsel, that, in an action of debt brought by the owner to recover the penalty given by the statute, he must aver in the declaration that he was the owner. (*Wright v. Bennett*, 3 Scam. 258; *Whiteside v. Divers*, 4 id. 336; *Jarrot v. Vaughn*, 2 Gilm. 132.) These decisions, being founded upon a special statute, have no application in the present case.

For the reasons above stated, the judgment of the circuit court is affirmed.

*Judgment affirmed.*

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GEORGE H. DILCHER

v.

FRANK SCHORIK.

*Opinion filed February 17, 1904.*

1. ELECTIONS—*jurisdiction on contest is limited to the question of who was elected.* The jurisdiction of the court in an election contest is limited to the question who was elected, and questions as to the regularity of respondent's nomination and his eligibility to office cannot be considered.

2. SAME—*eligibility to an office must be questioned by quo warranto.* Whether a party elected to office possesses the required qualifications for eligibility can only be determined by an information in the nature of *quo warranto*.

3. SAME—*rule as to validity of nominations.* Under section 10 of the Ballot act, certificates of nomination and nomination papers are deemed valid unless objected to, and in case of objection the decision of the board of town auditors, or board of election commissioners, where such board exists is final.

4. PRACTICE—*party not entitled to amendment regardless of what it is to be.* A party is not entitled, as of right, to have leave to amend a pleading regardless of what the amendment is to be, and there is no presumption that a proposed amendment will be a proper one.

5. SAME—*when it is not error to refuse leave to amend.* It is not error to refuse to allow leave to amend a pleading where the proposed amendment is not presented and where there is no means of determining whether the amendment will be proper.

APPEAL from the Circuit Court of Cook county; the  
Hon. R. S. TUTHILL, Judge, presiding.

CHARLES A. SURINE, for appellant.

L. A. KAPSA, and McCLELLAN & SPENCER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant filed in the circuit court of Cook county his petition, verified by affidavit, stating that he was a candidate on the democratic ticket for the office of constable at an election held April 7, 1903, in the town of West Chicago; that appellee was a candidate on an independent ticket; that appellee was declared duly elected, but was not eligible to the office on account of not being a resident of the town of West Chicago for a period of one year prior to the day of election, and that appellee, being an independent candidate, was not regularly nominated, for the reason that he did not file with the county clerk a certificate signed by the required percentage of the qualified voters of the town, as required by the statute. The petition did not question the election of appellee, but only the regularity of his nomination and his eligibility to the office. The court sustained a demurrer to the petition, whereupon appellant entered his motion for leave to amend the petition, which motion was denied by the court and the petition was dismissed.

Appellant, by his petition, did not seek to contest the election of appellee, and the court had no jurisdiction of the question sought to be raised by it. Section 10 of the Ballot law provides that certificates of nomination and nomination papers shall be deemed valid unless objected to, and in case of objection the decision of the board of town auditors, or of the board of election commissioners, where such board exists, shall be final. (Hurd's Stat. 1899, p. 804.) The question whether a person elected to office possesses the necessary qualifications can only be determined by information in the nature of *quo warranto*.

The jurisdiction of the court in a contest of an election is limited to the question who was elected. (*Greenwood v. Murphy*, 131 Ill. 604.) The court did not err in sustaining the demurrer.

The only other question is whether the court erred in refusing leave to amend the petition. The statute requires a verified petition, stating the points on which the election will be contested, to be filed within thirty days after the person whose election is contested is declared elected. The petition, which was filed within the time required by statute, did not state any point upon which the election was or could be contested. It merely asked the court to declare appellant, who was not elected, entitled to the office because appellee, who was elected, was not regularly nominated or eligible to the office. Any amendment which would give the court jurisdiction would necessarily constitute an entirely new and different petition after the limitation had run. But if the petition could have been amended no amendment was presented, and the motion did not state in what respect appellant proposed to amend the petition. He does not even now suggest what amendment he desired to make or could have made, but says the amendment was presumably to meet some objection to the petition. A party is not entitled, as of right, to have leave to amend a pleading regardless of what the amendment is to be. A party who desires to file an amended pleading should prepare and submit it to the inspection of the court. There is no presumption that a proposed amendment will be a proper one, and it is not error to refuse to allow an amendment which is not presented and where there are no means of determining whether the amendment will be a proper and sufficient one or not. *Jones v. Kennicott*, 83 Ill. 484; *McFarland v. Claypool*, 128 id. 397.

The judgment is affirmed.

*Judgment affirmed.*

ALTA IRWIN *et al.*

v.

THE NORTHWESTERN NATIONAL LIFE INSURANCE. CO.

*Opinion filed February 17, 1904.*

1. **APPEALS AND ERRORS**—*effect where the Appellate Court recites the facts in its judgment.* Where the Appellate Court recites the ultimate facts in its judgment reversing a judgment in a suit at law without remanding the cause because it finds the facts different from those found by the trial court, the only question for the Supreme Court is whether the facts found by the Appellate Court will support its judgment.

2. **SAME**—*when appellant cannot complain of evidence.* Plaintiff in an insurance case cannot complain that the court considered a certain exhibit as a part of the insurance contract, where no exception was taken to the proposition of law holding it to be such.

**APPEAL** from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Saline county; the Hon. A. K. VICKERS, Judge, presiding.

A. W. LEWIS, for appellants.

BROWN & KERN, and W. F. SCOTT, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court reversing, without remanding, a judgment obtained in the circuit court of Saline county in favor of appellants and against appellee.

The action is assumpsit upon an insurance policy issued upon the life of the father of appellants. The trial was before the court without a jury and upon a stipulation of facts. The case was formerly before this court, and a judgment of the Appellate Court was reversed and the cause remanded to the Appellate Court that the Appellate Court might make a special finding of facts and

recite the same in its judgment, as it appeared that the Appellate Court had reversed the judgment of the lower court because it found the facts differently from what they were found by the lower court. (*Irwin v. Northwestern Nat. Life Ins. Co.* 200 Ill. 577.) It is not necessary that we re-state the case here, as a complete statement is found in the report of the case when formerly before this court.

In the opinion remanding the case to the Appellate Court (p. 581) we said: "There were presented to the court for determination two questions of fact, or mixed questions of law and fact: First, was Irwin engaged in the occupation of a coal miner at the time he lost his life; second, did the appellee tender appellants the amount due upon the policy prior to the day the suit was commenced." Upon receiving the remanding order from this court the Appellate Court further considered said cause and adhered to its former opinion and judgment reversing the judgment of the circuit court without remanding the cause, and recited in its judgment the following ultimate facts: "We find as facts of this case, to be incorporated in the judgment, that J. A. Irwin, the assured, was engaged in the occupation of a coal miner at the time he lost his life, and that the appellant did tender to the appellees the amount due upon the policy sued on prior to the day suit was commenced, and that the appellees accepted the full amount due them prior to the coming on of this case for trial in the circuit court." Under the facts so found, the only question for the determination of this court is whether such facts are sufficient to support the judgment of the Appellate Court. (*Purcell Co. v. Sage*, 189 Ill. 79; *National Linseed Oil Co. v. Heath & Milligan Co.* 191 id. 75.) Under this finding no other judgment than the judgment entered by the Appellate Court would have been proper.

It is now urged by the appellants that both the trial and Appellate Courts, in determining the character of the contract between the assured and appellee, improp-

erly took into consideration a certain exhibit, designated "Exhibit B," in the stipulation of facts, by which it was agreed that if the assured should be injured or killed while in the occupation of mining coal but one-half the amount provided by the policy should be paid. The facts were before the court by stipulation and without objection or exception, and appellants offered no propositions of law to be held by the court with reference to the effect of the evidence or as to which of the exhibits should be taken into consideration by the court in determining the effect of the contract. Appellee, however, did offer six propositions of law to be held or refused by the court, the first and second of which were held and the others refused. The second proposition, as held by the court, was to the effect that the three papers, being the application, the stipulation contained in "Exhibit B" and the policy mentioned in the agreed statement of facts, all combined to constitute the contract of insurance sued on, and that one of the provisions of such contract is, that if the assured should come to his death by reason of the hazards of the occupation of coal mining, then the defendant should only be liable for one-half the amount named in the policy. Appellants did not except to this holding, and cannot now urge that the trial and Appellate Courts improperly considered the evidence mentioned in the holding.

Other questions are urged, but in view of the remanding order and the finding of the Appellate Court we deem it unnecessary to further consider or discuss them.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## SQUIRE RUSH HARRIS

v.

WALTER F. FERGUY *et al.**Opinion filed February 17, 1904.*

1. TRUSTS—*when trust created by will is active.* A will requiring the trustee named therein to sell and convey all real estate and re-invest the proceeds according to his judgment, hold, manage, lease, care for and invest and re-invest the trust estate as he sees fit, for a period of five years, paying the net income to the beneficiaries after two years and transferring the property to the beneficiaries at the end of the five years, creates an active trust.

2. SAME—*when trust is not void for uncertainty of its objects.* A trust created by will is not void for the uncertainty of its objects, where it is clear that the first objects of the bounty of the testator are her children and the second objects the issue of such children as died before the expiration of the trust period, the main purpose being to preclude the husbands or wives of her children from participation in the estate.

3. WILLS—*where two clauses of a will are repugnant the later one prevails.* Where two clauses of a will are so repugnant that one of them must fall, the later clause, being the last expression of the intention of the testator, must prevail.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

KERR & KERR, for appellant.

GEORGE F. MULLIGAN, (WILLIAM DILLON, of counsel,) for appellees.

Mr. JUSTICE RICKS delivered the opinion of the court:

February 5, 1903, appellees filed their bill in the circuit court of Cook county against appellant, praying for his removal as trustee and for the appointment of a successor, and an accounting by said appellant as such trustee. The bill alleged that appellant was trustee under the will of appellees' mother, and as such trustee was possessed of certain real estate in the city of Chicago and in Waukegan in which appellees had the beneficial

use, and that appellant refused to account to them or to pay them the proceeds of such property or any part thereof, and was converting the same to his own use; that appellant had not given a sufficient bond, and that he had threatened to sell the trust property under the supposed power given him by the will, and that appellant was irresponsible. Appellant answered the bill, admitting that he was trustee and possessed of the properties mentioned in the bill, but denying the allegations of the bill as to his refusal or failure to account to appellees, and alleged, on the contrary, that he had paid them the monthly rents, or such portion thereof as was in excess of the taxes, insurance and repairs, and in his answer rendered an account. The cause was heard, as far as we can tell from the record, before the court, but there is no certificate of evidence and no question of fact raised. The court construed the will, and held that by its terms and provisions appellees had a vested estate in fee simple in the real estate held by said trustee, and that appellees were the owners thereof in equal shares in common, and that the supposed trust created by the will in favor of appellant and under which he assumed to act was in the nature of a naked trust, to continue which would be to needlessly and without reason separate the legal from the beneficial or equitable interest in such real estate, and required the trustee to account, and ordered his removal, and enjoined him from disposing of any of the real estate under the provisions of the will. From this order appellant appeals, and insists that the court erred in holding that the will created in him only a naked trust and in requiring him to convey said real estate to the appellees, and in not holding that the trust was valid and to continue for the space of five years from the probate of the will.

From allegations of the bill and the decree it appears that Mary Ferguy, the mother of appellees, died testate December 25, 1900, and that her will was filed and admit-

ted to probate in the probate court of Cook county January 2, 1901, and that the appellant accepted the duties and office of executor and trustee under the will; that appellees are the sole heirs-at-law and next of kin of the said Mary Ferguy, the testatrix.

The will contained six general clauses. The first clause provided for the payment of debts and funeral expenses. The second provided for the payment of a certain sum for masses. The third provided for a monument for the testatrix and her husband, and the remaining portions of the will are as follows:

*"Fourth*—I order and direct my executor, as soon after my death as he thinks it advisable, to sell my real estate which I own in Waukegan, Lake county, Illinois, and Chicago, Illinois; also all other property, wheresoever found, which I may die possessed of, and to re-invest the same as in his judgment may seem best for my estate, and to convey by a good and sufficient deed of conveyance any property, both real and personal, for the purpose of carrying out my requests.

*"Fifth*—I give and devise to each of my children, Mary Ferguy and Walter F. Ferguy and Loretta Ferguy and William F. Ferguy, the remainder of my estate to share alike equally, each to have one-quarter, but should any child die without leaving issue or living children, that child's share shall revert to my remaining living children and to be divided equally, for it is my will and desire that should any of my children get married and leave no living children, the child so married, husband or wife, as the case may be, shall not be paid any portion of my estate, as I only desire my own children to get the benefit of my estate.

*"Sixth*—I hereby give, devise and bequeath unto Squire Rush Harris, of Chicago, as trustee, both all of my real estate and personal property wheresoever found, in trust for and upon the following trust purposes and conditions, to-wit:

"(1) To hold, manage, control, lease, care for and invest, and re-invest from time to time, said trust property for and during a period of five years from the time of my demise.

"(2) To pay the net income from said trust property after two years, at the end of each quarter year, over to my own living children only, to share alike equal, and after having first paid all fair, reasonable costs and charges of carrying, protecting and managing the said property.

"(3) To sell, convey and dispose of any of the trust estate during the life of the trust, when, from time to time, the trustee shall deem such disposition and sale expedient or necessary, the proceeds of said sales to be re-invested by the trustee in such income-bearing property, real or personal, as the trustee shall deem best.

"(4) Immediately upon the end of five years to transfer and turn over all the said trust property then held by the trustee to my own then living children, share and share alike equally, but should any of my own children named herein, Mary Ferguy, Walter F. Ferguy, Loretta Ferguy and William F. Ferguy, get married and leave children or child, it is my desire that the child so born and living shall be paid the share of my deceased child, should there be any, for it is my wish that my own said children get their equal share and none to be paid to the husband or wife of any of my children, should any of them get married and die, but that child who should die, her or his portion must be paid to the remaining living children in equal portions.

"Lastly, I make, constitute and appoint Squire Rush Harris (and direct that he give only his individual bond) to be executor as well as trustee of this my last will and testament, hereby revoking all former wills by me made."

We are not advised upon what theory the chancellor found that the trust provided for by the sixth clause of this will was a naked trust. By the fourth clause of the will the executor and trustee (who are the same person)

is ordered and directed to sell and convey all the real estate of the testatrix and re-invest the proceeds as in his judgment might seem best; and by the sixth clause, after declaring that the property is conveyed in trust to appellant, the first provision is: "To hold, manage, control, lease, care for and invest, and re-invest from time to time, said trust property for and during a period of five years from the time of my demise." By the second paragraph of the sixth clause the trustee is to pay the net income from the trust property after two years to the children of the testatrix in equal shares; and by the third paragraph of the sixth clause, as trustee, he is given power to convey and dispose of any of the trust property, at any time during the trust, that he shall deem expedient or necessary and re-invest the proceeds in any income-bearing property.

The general rule seems to be, that where control is to be exercised or duty to be performed by the trustee, or when he is to exercise discretion in the management of the estate or in the investment of the proceeds of the property, an active trust is created. (Perry on Trusts, sec. 300; *Kirkland v. Cox*, 94 Ill. 400; *Kellogg v. Hale*, 108 id. 164; *Hart v. Seymour*, 147 id. 598.) On the other hand, a simple, passive or dry trust, as it is variously called in the books, is one in which the trustee is a mere passive depository of the property, with no active duties to perform, which is executed by the Statute of Uses, and nothing remains for the trustee but to convey the property upon the request of the beneficiaries. (*Silverman v. Kristufek*, 162 Ill. 222; *Kellogg v. Hale*, *supra*; *Kirkland v. Cox*, *supra*.) And unless the clause of the will providing for a trust should be held void for uncertainty of its objects, or from some cause arising from its provisions, we know of no ground upon which this decree can be sustained.

Appellees urge that this latter ground is sufficient to sustain the decree, because, it is argued, by the fourth

paragraph of the sixth clause it is uncertain who is to take at the period of distribution. We think, upon reading the clause and the whole will, it is entirely apparent that it was the intention of the testatrix that her children and their issue should be the only persons who could take under any of the provisions of the will; that the first objects of the testatrix's bounty were her children, the second objects, the issue of such children as died before the expiration of the trust period, and that the one main purpose to be effected by the will was the shutting out or precluding the husbands or wives of her sons and daughters from any benefit in the estate.

Appellees further say that the sixth clause of the will, providing for the trust estate, is repugnant to the fifth clause, which is in terms a devise directly to the living children of the testatrix; and this must be admitted to be true. But it does not avail appellees if this contention is well founded, as the rule is well established that if there be such repugnancy between two clauses of a will that the one or the other must fall, the later clause, being regarded as the last expression of the testatrix, must prevail. The will in question bears evidence of having been written by the testatrix, and indicates that she became uncertain what would be the result if no further provision than that in the fifth clause were made, and she conceived the idea of creating the trust provided by the sixth clause, which, in its legal effect, is materially different from that of the fifth clause. Under the fifth clause the estate of appellees would be vested upon the death of the testatrix. Under the sixth clause, as it is, the estate could not vest until the expiration of five years from the death of the testatrix, because the direction is that the trustee shall, after the end of five years, transfer the trust property to the "then living children, share and share alike," and if any child shall be dead leaving issue, the issue of such child shall take the deceased child's part, and if a child shall be

dead without issue, the surviving brothers and sisters shall take.

We do not see any ground upon which this decree can be sustained. We think this trust an active one, and that it should endure for the time mentioned in the will, that is, five years from the demise of the testatrix.

The decree of the circuit court is reversed and the cause remanded to that court for such further proceedings as are in conformity with this opinion and to justice may appertain.

*Reversed and remanded.*

THE TRADERS' MUTUAL LIFE INSURANCE COMPANY  
v.

LUCIUS F. HUMPHREY.

*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*when judgment of Appellate Court as to when insured became a member of the lodge is final.* The judgment of the Appellate Court affirming a finding by the jury that the insured was a member of defendant's lodge when her certificate of insurance was issued is final, where no question of law is raised by obtaining rulings on instructions or evidence, or otherwise.

2. SAME—*when motion to quash summons and service is properly denied.* A motion to quash summons and service and dismiss the suit upon the ground that plaintiff is a non-resident is properly denied, where it was not made at the earliest moment after such alleged non-residence was discovered but was delayed until after the jury had been selected and sworn.

*Traders' Mutual Life Ins. Co. v. Humphrey*, 109 Ill. App. 246, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. M. W. THOMPSON, Judge, presiding.

HAL H. SMITH, for appellant.

ISAAC A. LOVE, and W. R. JEWELL, Jr., for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee brought his action of assumpsit in the circuit court of Vermilion county, against appellant, on a policy of life insurance or certificate of membership issued by appellant on the life of Sarah C. Humphrey, his wife, in the sum of \$1000, for his benefit.

Some time prior to September 12, 1893, the insured, who lived with the plaintiff, her husband, in South Bend, Indiana, was solicited by an agent of appellant to become a member of said company. At that time she was not a member of the order of Odd Fellows, but on August 22, 1893, made her application for membership to Schuyler Rebecca Lodge No. 39 of South Bend, Indiana. On September 12, 1893, she was elected to membership in said lodge, but was not initiated, did not sign the by-laws and was not formally introduced to the lodge as a member until October 10, 1893. Immediately upon receiving the notice of her election, on September 12, 1893, she made written application to appellant for a certificate of insurance, and in her application stated that she was a member of Schuyler Rebecca Lodge No. 39, located at South Bend, Indiana. The certificate of membership upon this application was issued to her on September 21, 1893. She thereafter paid all of the dues and assessments on said certificate of insurance to the time of her death, being more than eight years. On December 13, 1901, the president of the appellant company, in reply to a letter received from her, wrote as follows: "In reply to the same will say that it is not necessary that you belong to any lodge in order to hold your present policy with this company. All that is necessary for you to do is to make payments constantly and on time in the above named company and your policy will be all right." After the issuing of the certificate on September 21, 1893, and before this letter of December 13, 1901, was written, the charter of appellant company was so changed as not to restrict it to insurance on Odd Fellows merely, as it had

formerly provided, but permitted it to issue insurance to any person. On December 24, 1901, the insured died, having, as before stated, paid all of the premiums due on said certificate up to the date of her death, and in February, 1902, proof of her death was made to the appellant company, as required by its rules. On March 4, 1902, the company, by its president, notified appellee, by letter, that the company had recently obtained evidence which showed that at the time the insured made her application and received her certificate of membership she was not an Odd Fellow, and that the certificate was therefore void. Thereupon, on August 4, 1902, appellee brought this suit to recover the amount due upon the certificate, and upon a trial before a jury judgment was rendered for \$1036.62, and the same has been affirmed by the Appellate Court for the Third District.

The first question raised is, that by its charter the appellant company was limited to provide life indemnity for acceptable members of the fraternity of Odd Fellows not over sixty years of age, and that the issuing of this certificate was an *ultra vires* act on the part of the appellant company; also, that the insured did not become a member of said lodge or fraternity of Odd Fellows until October 10, 1893, which was after the delivery of the certificate to her. The last question,—that is, whether the assured was a member of the order of Odd Fellows at the time she received her certificate of membership,—is upon this record purely a question of fact. Evidence was offered in the trial court for and against the contention of appellant, and the verdict of the jury found that she was a member at the date of the issuing of the certificate, and that finding having been affirmed by the Appellate Court, is final and conclusive upon this court. The question as to when she became a member is not raised here on the giving, refusing or modifying of instructions to the jury, nor is any question made as to the rulings of the trial court on the admission or exclusion

of testimony. If the insured was a member of the order of Odd Fellows at the time the certificate was issued to her,—that is, if she became a member, as contended by appellee, from the date of her election, under the by-laws and regulations of the company,—then the act of issuing to her a certificate was in no sense *ultra vires* and that question does not enter into the case. Treated as a mixed question of law and fact, the Appellate Court properly disposed of the point. This disposes of the only question upon the merits of the case raised and argued in this court.

After the jury had been selected and sworn and the plaintiff's opening statement had been made, counsel for appellant entered a motion to quash the summons and service and dismiss the suit on the ground that the plaintiff was a non-resident of the State of Illinois, residing in the State of Ohio, and leave was also asked to introduce evidence to show that plaintiff resided in Ohio up to January 7, 1903. This the court refused to allow, basing his decision upon the fact that the motion was made too late, and that ruling is also assigned for error. We think the ruling was proper, for the reason that it was not made at the earliest moment after the appellant discovered the alleged fact of the non-residence of the plaintiff, but delayed its motion until after the jury had been empaneled and sworn. The offered evidence was properly refused because it did not pretend to establish the distinct fact that at the time the suit was brought the plaintiff was a resident of Ohio. The offer was merely that he resided in Ohio up to January 7, 1903, but there was no offer to show when he became a resident of that State, nor that he was not an actual resident of this State at the time the action was brought.

We think the judgment of the Appellate Court is right, and it will accordingly be affirmed.

*Judgment affirmed.*

THE CHICAGO UNION TRACTION COMPANY

v.

THE CITY OF CHICAGO.

*Opinion filed February 17, 1904.*

1. ORDINANCES—*constitutional provision as to title of statutes does not apply to ordinances.* The constitutional provision that no law shall embrace more than one subject, which shall be expressed in its title, does not apply to city ordinances, in the absence of any statute to that effect. (*Smith v. Chicago*, 169 Ill. 257, explained.)

2. SPECIAL ASSESSMENTS—*lots owned by street railway company not within proviso to section 40 of Improvement act.* Lots owned by a street railway company but not a part of its right of way are not within the proviso to section 40 of the Local Improvement act, excepting certain property from the rule that each lot, tract or parcel of land must be assessed separately.

3. SAME—*when lots of street railway company may be assessed together.* Lots of a street railway company improved as one parcel for car barns and storerooms, and other lots used for stables and other purposes, may be grouped, under the amendment of 1901 to section 41 of the Local Improvement act, (Laws of 1901, p. 106,) and those improved as one parcel may be assessed as such.

4. SAME—*not necessary that all buildings be under one roof.* To constitute improvement of land as one parcel, within the meaning of section 41 of the Local Improvement act as amended in 1901, it is not essential that all buildings be under the same roof, in analogy with the law in reference to mechanics' liens.

5. SAME—*benefits to lots not limited to particular use.* The fact that lots owned by a street railway company are devoted solely to use as a site for car barns does not limit the special assessment for paving the street to the benefit conferred upon the property for such particular use, regardless of its effect upon the market value of the lots for other purposes.

6. SAME—*assessment roll is prima facie evidence of benefits.* The introduction of the assessment roll in evidence makes a *prima facie* case that the property assessed is benefited to the extent of the assessment.

APPEAL from the County Court of Cook county; the Hon. ROLLAND A. RUSSELL, Judge, presiding.

WILLISTON FISH, and LOUIS BOISOT, (JOHN A. ROSE, of counsel,) for appellant.

ROBERT REDFIELD, (EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel,) for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal prosecuted from the county court of Cook county from a judgment of that court confirming a special assessment levied to defray the cost of curbing, grading and paving Racine avenue from Clybourn avenue to Center street, in the city of Chicago. The property assessed to and objected for appellant is in Sheffield's addition, and in the assessment roll is described as sub-lots 12 to 19 and 20 to 29 in the subdivision of lot 1 and part of lot 2, block 9, in said addition. Sub-lots 12 to 19 were assessed \$932.50 and sub-lots 20 to 29 were assessed \$1060.05.

Appellant appeared and filed numerous legal objections, which, upon the hearing before the court, were overruled, and by agreement of parties a trial by jury was waived as to the question of benefits and the cause submitted to the court for trial without a jury. The court having heard the evidence upon the question of benefits, found that the property was not assessed more than it would be benefited or more than its proportionate share of the cost of the improvement, and confirmed the assessment. It is now insisted (1) that the ordinance is void; (2) that the assessment was improperly spread upon the lots by placing the same in two groups instead of assessing them separately; (3) that the court erred in refusing to mark "held" appellant's ten propositions of law; (4) that the court erred in the exclusion and admission of evidence; and (5) that the finding of the court as to benefits is contrary to the weight of the evidence.

The objections filed at the first hearing before the court were broad enough and sufficient to cover the legal objections here insisted upon. The first objection, as stated by appellant, is: "The ordinance provides for new gutter flags and re-setting curb-stones, while the caption covers new combined curb and gutter." The caption of

the ordinance in question is as follows: "For the improvement, plastering curb walls, re-setting curb-stones, constructing a granite concrete combined curb and gutter, grading and paving of the roadway of Racine avenue from the north line of Center street produced from the east to the north-easterly curb line of Clybourn avenue, and also the roadways of all intersecting streets and alleys extended from the curb line to the street line produced on each side of said Racine avenue between said points, (except street railway rights of way thereon between said points,) in the city of Chicago, county of Cook and State of Illinois."

Appellant urges that there is a variance between the caption of the ordinance and the details of provisions in the body of the ordinance relating to the curb and gutter. As to the curb and gutter, the provisions of the ordinance are, substantially, that the curb walls now in place on each side of the roadway, and also on each side of the roadways on intersecting streets and alleys, shall be plastered on their face from the top surface down for the space of five feet, and shall be re-set in such manner that the roadway face of said curb-stones shall be parallel with and nineteen feet from the center line of said Racine avenue, and that there shall be constructed granite concrete gutter-flags eighteen inches in width and five inches in thickness, (giving the details for their construction,) so that the upper surface of the gutter-flags shall conform to the surface of the finished roadway. We do not think the objection here made tenable, but think that, in a general way, the caption covers all contained in the ordinance relating to the curb and gutter. *Thompson v. City of Highland Park*, 187 Ill. 265.

But if there were a variance we are of the opinion that it would be immaterial and insufficient upon which to declare the ordinance void. It is believed that the constitutional provision requiring that no law shall contain more than one subject, which shall be clearly ex-

pressed in its title, only applies to State legislation, and not to the ordinances of cities, and that in the absence of a statute containing a similar requirement to the constitution in the passage and adoption of ordinances, the constitutional requirement as applicable to acts of the General Assembly need not be observed in the passage of ordinances. (21 Am. & Eng. Ency. of Law,—2d ed.—975; *Village of Hinsdale v. Shannon*, 182 Ill. 312; *People v. Hanahan*, 75 Mich. 611; *People v. Wagoner*, 86 id. 594; 24 Am. St. Rep. 141; *Tarkio v. Cook*, 120 Mo. 1.) The only statutory requirement as applied to ordinances is as to the style or enacting clause, and the requirement is that the style of the ordinance shall be: "Be it ordained by the city council of," etc. (Hurd's Stat. 1899, chap. 24, art. 5, par. 63.) To require of cities and villages the same certainty and care with reference to the titles of ordinances that is required of the General Assembly in the enactment of laws for the State, would, we think, be requiring of such city and village authorities greater precision than is contemplated by the law or ought reasonably to be expected of bodies constituted as they are authorized to be.

The contention of counsel that *Smith v. City of Chicago*, 169 Ill. 257, sustains the position here contended for by appellant cannot be admitted. The view there expressed was, that the provisions of the ordinance in the main body thereof, as found in section 2, authorized a local improvement for the erection of lamp-posts only, and that in attempting to give the details of the construction of the lamp-posts, in section 6, the provisions of the latter section of the ordinance extended beyond the declared purposes of the ordinance in its main body, by declaring the method of connecting cables, switches and arc lamps with the same, and while the following language there used, "clearly the description is inconsistent and cannot be reconciled with the improvement named in the title and provisions of the ordinance authorizing the improvement," would seem to lay some stress upon a

variance between the caption or title of the ordinance and the provisions thereof, the holding was based upon the departure of the sixth section, in its specifications, from the provisions of the second section, which declared what improvement was authorized.

It is further complained of the ordinance that it is uncertain, in that it does not sufficiently fix the height of the curb at a supposed alley between Maud and Clybourn avenues. The objection filed was, that the ordinance is uncertain in describing the pavement in the intersecting alleys. Racine avenue runs north and south and crosses Center street, Maud and Clybourn avenues. Appellant argues that as the grade is fixed at thirteen feet above datum at Center street, thirteen feet above datum at Maud avenue and twelve and five-tenths feet above datum at Clybourn avenue, the curbs on the different sides of an alley between Maud and Clybourn avenues would necessarily be of different heights,—one lower than the other,—and as the specifications required “the surface of the finished pavement of all intersecting alleys \* \* \* shall be four inches below the top of the curb \* \* \* on each side of said alley intersections and parallel therewith,” it would be impossible to comply with that requirement with the height of the curbs varying on the two sides of the alley. There is no evidence that there is an alley between the points discussed, and if there is, it seems to us the objection here made is too refined and technical to be allowed to prevail in such ordinance. We will presume, in a matter of such small detail, that the contractor and engineer will be able to so construct a pavement of the kind called for in the ordinance, of the material therein designated, and nearly enough in the manner therein called for, that it will meet all purposes of travel, although there may be a slight variation in the height of the curb on the two sides of an alley; and certainly, upon a mere supposititious difficulty, concerning which there is no evidence,

oral or otherwise, we are not disposed to declare this ordinance void.

It is next urged that it was improper, in spreading the assessment upon the lots of appellant, to have placed the same in two groups, one consisting of lots 12 to 19 and the other of lots 20 to 29, and assessed them in that manner instead of assessing each lot separately. Appellant invokes section 40 of the Improvement act, (Hurd's Stat. 1901, p. 385,) as follows: "In levying any special assessment or special tax, each lot, block, tract or parcel of land shall be assessed separately in the same manner as upon assessment for general taxation: *Provided*, that this requirement shall not apply to the property of railroad companies, or the right of way, and franchise of street railway companies, but the same may be described in any manner sufficient to reasonably identify the property intended to be assessed;" and reliance is placed upon the case of *Howe v. People*, 86 Ill. 288, and several cases from other States. The *Howe* case we do not regard as any authority upon the proposition here urged. *Howe* was the owner of eighty acres of land in a certain section, and two tracts of land adjoining it, lying in the same section but belonging to other persons, were, together with *Howe's* land, included in a single assessment, and taxes to the amount of over \$1000 were placed against the combined property. There was no way to determine how much *Howe's* land was assessed or taxed, and it was held that the assessment, made in that manner, was void. In *Moore v. People*, 106 Ill. 376, which was a special assessment case under the Drainage act, and where the provision was quite similar to that in the Local Improvement act as to assessments, it was held proper to assess four hundred and twenty acres of land belonging to the objector in a single assessment, although there was no single description that would describe the tract.

Appellee takes the position that this mode of assessment is authorized by the amendment of 1901 of section 41

of the Local Improvement act, (Hurd's Stat. 1901, chap. 24, par. 547,) which is as follows: "Several lots, or parts of lands, owned and improved as one parcel, may be assessed as one parcel," and further contends that the proviso to section 40, above quoted, also applies. We do not agree that the proviso to section 40 has any application to the property here objected for. The property in question is not the property of a railroad company and is no part of the right of way or franchise of a street railway company, and those are the only classes of property affected by the proviso.

From the evidence in this record it is somewhat difficult to get a clear conception of the location and exact situation of the two groups of property of the assessment of which it is complained. In the trial before the court a map was used and referred to by most of the witnesses, but it does not seem to have been put in evidence and is not in the record. As nearly as we can understand the testimony of the witnesses, lots 12 to 19 are entirely covered with buildings. On lot 12 is a one-story brick building, and lots 13 to 19 are covered with a car barn used for the storage of cars. Lot 12 joins lot 13, and the building on lot 12 and the car barn have a wall in common between them. The building on lot 12 is used for the storing or keeping of waste iron. Lots 20 to 26 lie substantially south of the first group of lots we have mentioned, and lots 20 to 26 have upon them an old car barn that is now used for a stable for horses and the keeping of wagons and such things appertaining to the business of appellant, and on lot 27 is a small private alley of about twelve feet in width, dividing the buildings that are located on lots 20 to 26 from another large building that is located on the remainder of lot 27 after the alley is taken off, and also on lots 28 and 29. These properties all belong to appellant, and, according to the testimony of its foreman, are all used as one plant, and we are clearly of the opinion that it was not error to assess,

and that no injustice was done appellant in assessing, the lots in two groups, in the manner they were assessed.

Appellant urges that the law applicable to mechanics' liens is analogous to the rule with reference to assessments of property, and that only those properties that can be said to be under one roof can, under the Mechanic's Lien law, be treated as one improvement for a single lien, and that by analogy the same rule is applicable for the assessment of property under the Local Improvement act. We think not, and regard such construction too narrow for the language used in the amendment of 1901 of section 41 of the Local Improvement act, which authorizes "several lots or parts of land owned and improved as one parcel" to be assessed as one parcel. The private alley between the buildings on the second group of lots, left there for appellant's convenience, or for fire protection, or other cause, cannot be said to be a severance of the properties of such a character as to prevent their being treated as one parcel, when the undisputed evidence shows that they in fact constitute one plant. And so, too, as to the division of the buildings on lots 12 to 19. The simple fact that one of them is a building in which old iron is stored and the other is one in which cars are stored, but all joined together and all constituting substantially one improvement and used as one parcel, is not sufficient, as we interpret the law, to prevent the lots constituting one parcel and being assessed as one parcel. In *Pfeiffer v. People*, 170 Ill. 347, it was objected that lots 7 and 8 and lots 1 to 16 in a certain block in the city of Alton were assessed in two separate groups. The county court overruled the objection and we affirmed its judgment, and regard that case as applicable to and supporting the views expressed here. If the alley separating the buildings in the second group of lots (20 to 29) were a public alley there would be more reason in the contention here made and some authority to support it, but the mere leaving of a passageway, upon one's own property,

between the buildings would not seem to us sufficient to require the classification of the property as constituting separate groups or parcels.

Proposition No. 10 offered by appellant and refused by the court was, in substance, that if the evidence shows that any part of the property objected for is permanently devoted solely to use as a site for a street railway car storage barn, the assessment against such part of said property in this proceeding is limited by the benefit conferred on said property by said improvement for such use, and the fact that the general market value of the property or its desirability for any other purpose may be increased by the improvement is not material in the decision of this case. This holding was properly refused. *Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576; *Chicago Union Traction Co. v. City of Chicago*, 204 id. 363.

This proposition is so fully discussed and reviewed in the case last cited that it would seem unnecessary to again review it, and as appellant proceeded upon an erroneous theory in fixing the benefits to the property, the complaint that the court erred in the admission and exclusion of evidence cannot be sustained, as the evidence admitted went upon the theory of the increase in the market value, and the evidence excluded was to the proposition that the property was not benefited for the particular use. The assessment roll was introduced in evidence, and it was *prima facie* evidence that the property was benefited to the extent of the assessment upon the true legal theory. Appellant's evidence was upon an erroneous theory and did not rebut or overcome the evidence in the assessment roll; and besides, there were witnesses who testified that the market value would be increased by the improvement to the extent of or more than the assessment.

The judgment of the county court is affirmed.

*Judgment affirmed.*

## THE DEACONESS HOME AND HOSPITAL

v.

AMELIA BONTJES.

*Opinion filed February 17, 1904.*

1. INJUNCTION—*when carrying on of hospital will be enjoined without a verdict declaring it a nuisance.* The carrying on of a hospital in proximity to complainant's dwelling may be enjoined as a private nuisance without a judgment at law, where the evidence is clear and certain that the hospital, as conducted, injures the health of complainant's family and destroys their peace and comfort.

2. SAME—*when the relief granted sufficiently corresponds to the relief prayed.* If the relief granted on a bill for injunction is within the prayer of the bill and not inconsistent therewith, the fact that it is not so extensive as the relief prayed does not defeat the decree.

3. HOSPITALS—*hospital must not be so conducted as to be a nuisance.* A hospital must not be conducted in such a manner as to be a nuisance to adjoining property owners who are in nowise responsible for its location and operation.

*Deaconess Home and Hospital v. Bontjes*, 104 Ill. App. 484, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

"Mrs. Emelia Bontjes, a widow, bought a half lot, fifty feet wide and three hundred and twenty-three feet deep, upon a bluff in a residence district in the city of Peoria, at a cost of over \$5000, and in 1894 built thereon a dwelling house, which she has ever since occupied as her home. She also built a barn. She expended about \$13,000 in improvements. Her family consists of herself, her daughter, her daughter's husband and their little child. When she bought this tract and built her house thereon, the lot next east, one hundred feet wide, had upon it a brick house, designed for and occupied by a private family. Its main rooms and most of its windows faced west. Mrs. Bontjes built her house with the rooms and windows mainly on the east side. Thus the living

apartments and most of the windows of the two houses face each other. There is a space of thirty or thirty-five feet between the two houses, two or three feet of which is owned by Mrs. Bontjes and the rest is part of the lot on which the brick house stands. Next to the brick house is a walk by which to pass between the front and rear of those premises, and between that walk and Mrs. Bontjes' lot line is a driveway for teams and carriages, used in connection with the brick house and the only means of access to the brick house for conveyances. The front of each lot is occupied by a terraced slope to the street, which is nearly one hundred feet below. In October, 1898, a corporation was organized under the laws of this State, named 'The Deaconess Home and Hospital of the Central Illinois Conference,' having its office and principal place of business at Peoria. Its purpose was declared to be 'to establish and maintain a Deaconess home and hospital in co-operation with the Methodist Episcopal Deaconess Society,' and 'to provide for and carry on all the varied religious, educational, humane and philanthropic work which may properly come within the province of such an organization, in accordance with the discipline of the Methodist Episcopal Church of the United States.' In November, 1898, the society purchased the brick residence and the lot on which it stood, for \$12,000, and established there a Deaconess home. In the spring of 1900 it made some changes in the interior of the building, and on May 24, 1900, it opened there a hospital for the care and treatment of the sick and injured, which it has ever since maintained. On November 1, 1900, Mrs. Bontjes filed a bill in the court below to enjoin the Deaconess Home from further carrying on and operating said home and hospital. The facts which she claimed entitled her to that relief are set out at length in the bill. The defendant answered, admitting some allegations and denying others. The cause was referred to a master to take and report proofs, with his conclu-

sions of law and fact. The proofs were taken from January to May, 1901. The master's report was in favor of complainant. Defendant filed objections thereto, which the master overruled. The report was filed in court, and defendant filed exceptions thereto. The court did not act directly upon these exceptions, but entered a decree finding the facts in detail, ending with the conclusion that defendant's hospital is a private nuisance and ought to be abated; that the equities are with the complainant, and she has no adequate remedy at law. It was decreed that defendant be permanently restrained from carrying on or operating a hospital in the building on defendant's said premises 'during the continuance of the relative proximity of the complainant's said residence and the building of defendant heretofore used on its said lot as a hospital, and of the present internal and external construction of defendant's said building.' This is an appeal by defendant from said decree.

"From the time the hospital was opened till the testimony was closed, the hospital had been run at substantially its full capacity. During the first ten months it had one hundred and fifty to one hundred and sixty patients. The barn back of the brick house was made an annex to the hospital to increase its capacity. From complainant's living rooms, up-stairs and down, the operations of the hospital were often visible day and night. What was said in the operating room during an operation in summer time, when the windows were necessarily open, was often heard in the bed-rooms in complainant's house. The inmates of complainant's house, looking from its rooms, saw patients in the hospital entirely nude and others partially disrobed while surgical and other operations were being performed upon them. They saw surgical instruments, naked human limbs held aloft and a fountain syringe used upon patients. They saw the bedding changed under patients too ill to be removed from the bed. They heard moans and groans, and pa-

tients crying and vomiting. When surgical operations took place at night they were performed under a bunch of six electric lights, which made complainant's rooms opposite light enough to read by, unless the reflection was excluded by keeping the shades down, which was not practicable in warm weather, when ventilation made it necessary to keep complainant's windows open. Soiled and bloody bandages and other unsightly articles from the sick room were deposited in a receptacle in the back yard and afterwards taken out by a scavenger in such a way as to make the sight offensive. Whenever a patient died or recovered, the mattress, quilts and sheets, and the rubber cloth used on the patient's bed, were ventilated in the back yard near complainant's yard and in full view. As defendant's barn or annex was only fifty feet from the hospital proper, the space for such ventilation was limited. This airing of bedding was of daily occurrence. The odor of iodoform and other drugs from the hospital pervaded complainant's house, passing through the open windows in the summer time and through the cold air duct in the winter, this effect being afterwards obviated for the winter by taking in the cold air for the furnace from a different side of the house. Ambulances conveying sick patients or persons injured in accidents came in over the driveway at all hours of the day and night, passing close to complainant's living rooms and bed-rooms. Physicians were daily driving in over that driveway, hitching their horses there, and frequently driving away late at night or in the early hours of the morning, after attending patients and performing surgical operations. If it was warm weather, complainant's windows were necessarily open, and also the hospital windows, and the sounds connected with the receipt and handling of persons seriously hurt or very ill, both outside and also inside the hospital, would very often be heard in complainant's house. From time to time coffins were brought to the hospital and afterwards removed

with dead bodies in them. This was generally done at night, in which case complainant and her family were usually awakened by the noises and aware of the cause. It has, however, been done several times during the meal time, and the ambulance would be but a few feet from complainant's dining room. Sometimes the dead patient was not removed in a coffin, but on a litter, the form showing through a cloth laid over the body. Patients who had sufficiently recovered to take exercise were caused to walk back and forth between the houses, attended and supported by a nurse. In such cases sometimes the patient was wrapped in a blanket or the head was bandaged. In very warm weather patients were brought out and placed on the front porch or in the front yard, and placed in easy chairs and hammocks. The nurses fanned the patients and administered medicines to them, and took their temperature, in the front yard. Women about to be confined, and who had come to the hospital for confinement, sat upon the front porch in hot weather, clad in loose garments. These uses by defendant of its front yard and porch precluded complainant and her family from using her adjoining front yard and porch, and especially were they debarred from entertaining their guests and callers upon her front yard and porch. We have not stated all the offensive details given in complainant's proof, but only an outline thereof. Defendant's proof did not overcome the case thus made. Two persons who have at different times acted as superintendent of the hospital testified they were unable to see how some of those things could have occurred and that some others must have arisen from disobedience of rules by attendants, and officers of defendant expressed their desire to do what they reasonably could to avoid giving offense, but no substantial attempt was made to deny the main specific facts detailed in complainant's proof. The events and incidents we have referred to greatly disturbed the comfort and nerves and sleep of the inmates of complain-

ant's home, and she and her family were greatly annoyed and distressed in mind. Complainant was deprived of the ordinary use and enjoyment of her property. In the main these sights and sounds and smells were not abnormal, but were the usual and necessary accompaniments of a busy hospital, conducted with a view to the proper treatment of persons who are in great pain and distress."

The foregoing statement of the facts of this case appears in the opinion of the Appellate Court herein, and such statement has been adopted by us.

It further appears that typhoid fever and erysipelas were treated at this hospital, and the medical evidence was to the effect that these diseases were contagious and might be contracted in the Bontjes residence when the windows of the hospital were open and the wind was blowing from that direction. It further appears that both appellee and her daughter were made sick and nervous by the sights, sounds, odors and influences to which they were subjected by this institution; that neither was able to regain her health at home, but both were obliged to go elsewhere for several weeks to recover.

The Appellate Court affirmed the decree rendered on the circuit, and the case comes to this court by a further appeal.

SHEEN & MILLER, and WINSLOW EVANS, for appellant:

Findings of fact by the Appellate Court are not conclusive in chancery cases. *Henry v. Caruthers*, 196 Ill. 136.

The courts of equity leave the question of nuisances, and their damages, to courts of law, except where the injury is irreparable or permanent and results from a wrongful act. *Wahle v. Reinbach*, 76 Ill. 322; *Barrett v. Cemetery Ass.* 159 id. 391.

Where the nuisance is one *per se*, no adjudication at law is necessary preliminary to the jurisdiction by injunction. *Smith v. McDowell*, 148 Ill. 69.

Where not a nuisance *per se* the nuisance must be admitted or irreparable injury alleged and clearly proved. *Oswald v. Wolf*, 129 Ill. 200.

The injury complained of must be permanent or continuous and such as cannot be prevented except by injunction. *Nelson v. Milligan*, 151 Ill. 467.

A nuisance may be both public and private, and depends on the propriety of place and manner of operation. *Wylie v. Elwood*, 134 Ill. 287.

The use of property, to be a nuisance, must be unwarrantable, unreasonable or unlawful, and result in injury to another. *Powder Co. v. Tearney*, 131 Ill. 326.

The relief prayed and that granted do not correspond, and must do so to be valid. *Dorn v. Gueder*, 171 Ill. 362.

The city has power to abate a nuisance if it exists, and to do all acts required to protect the complainant. Rev. Stat. chap. 24, pars. 76-79.

Relief by injunction will be denied where it is doubtful if the injury complained of will be permanent. *Robb v. LaGrange*, 158 Ill. 21.

JAMES A. CAMERON, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The first assignment of error to which our attention is called is that the relief granted does not correspond with the relief prayed in the bill. The prayer is, that the defendant be "restrained and enjoined from further operating and carrying on said home and hospital." By the decree it is permanently restrained from carrying on and operating a hospital in the building which it now occupies "during the continuance of the relative proximity of the complainant's said residence and the building of the defendant heretofore used \* \* \* as a hospital, and of the present internal and external construction of the defendant's said building." The relief granted is not as extensive as that prayed, but is not inconsistent there-

with, and that granted is within the prayer of the bill, and the decree is therefore sustained by the bill.

It is then urged that as the hospital is not a nuisance *per se*, its operation cannot be enjoined until there has first been a determination by the verdict of a jury in an action at law that it is a nuisance.

From the evidence in this case it is clear and certain that the hospital conducted by appellant is a private nuisance. It not only destroys the peace, quiet and comfort of those living in the residence of appellee, but likewise seriously and injuriously affects their health, and occasions irreparable injury within the meaning of the law. Under these circumstances equity will interfere by injunction, without waiting for a determination of the question of the existence of the nuisance in an action at law. (*Wahle v. Reinbach*, 76 Ill. 322; *Dierks v. Commissioners of Highways*, 142 id. 197.) If there is such contrariety of evidence that there remains a substantial doubt whether a nuisance exists, the question should first be determined in a suit at law. (*Oswald v. Wolf*, 129 Ill. 200.) In this case, however, there is no evidence which tends to show that a nuisance does not exist. The most that can be said for the evidence offered by appellant is, that it indicates that the wrong is not of so serious a character as complainant charges, and that it may be lessened somewhat by certain precautions which appellant is willing to use hereafter. The proposed measures would not result in an entire removal of the nuisance. It is said that a screen may be erected between the two properties, and that the windows of the hospital may be kept closed and the curtains drawn on the side next the property of appellee. It is manifest that in the summer time the windows must be opened and the curtains drawn aside in both buildings for ventilation, and it is equally apparent that the screen would not prevent the cries of the suffering, the moans of the dying and other offensive noises being heard in the home of the appellee; nor would such

an obstruction entirely prevent the transmission of the smell of iodoform, ether and other offensive substances; nor would the annoyance resulting from the frequent visits of the hearse and the ambulance to the hospital be materially lessened by the proposed precautions.

The work in which appellant is engaged is philanthropy of the highest order, but the law will not permit it to be conducted in such a manner that it becomes an intolerable nuisance to those who are in nowise responsible for its location and operation.

The statement is made that appellee had the power in her own hands, by mere request to those who were operating the hospital, to prevent the injury complained of, and it is insisted that she failed to speak when fairness and good conscience required her to make her objections known to the hospital authorities, and that she is therefore estopped to now seek the aid of a court of equity. Without stopping to consider at all this proposition of law, it is sufficient to say that the argument is based upon a misapprehension of the evidence. Prior to the establishment of the hospital appellee objected to its location in the building in question. She made these objections known to persons who were raising money by subscription to set the hospital on its feet, and offered a donation if it was located elsewhere. From the testimony of Mr. Walter Wyatt, secretary of the board of trustees of appellant, it appears that complaint was made to him by Cameron, the attorney for appellee, prior to the beginning of this suit, of the manner in which the institution was conducted. Wyatt, in substance, invited this litigation by stating to the attorney that he saw no way out of the matter except to bring suit. Wyatt, however, reported the complaint to the trustees, who took no action except to direct the superintendent to conduct the hospital in such a manner that there would be no complaint from any one. This direction bore no practical fruit.

The trustees testified that they did not know that the hospital was being conducted in a manner so offensive to those in the home of appellee; that had they known of the condition of affairs they would have minimized the evil as far as possible. This is no answer to the complaint. They were responsible for the management of the institution, and it was their duty to see that it was conducted in such a manner that the lawful rights of others were not infringed.

From the evidence before us, this difficulty seems to come about from the fact that the grounds occupied by appellant are wholly inadequate in extent for the operation of a hospital of the character there conducted.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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CHARLES S. PAYNE *et al.*

v.

HENRY A. WHITE *et al.*

*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*whether freehold is involved on bill to remove cloud depends upon nature of cloud.* Whether a freehold is involved on a bill to remove a cloud upon title to real estate depends upon the nature of the alleged cloud.

2. SAME—*freehold not involved on bill to cancel conditional contract to convey.* A freehold is not involved on a bill to cancel an executory or conditional contract to convey land, even though the defendants claim they have performed the contract up to the time of the filing of the bill but do not seek any conveyance nor ask any relief.

APPEAL from the Circuit Court of Stark county; the Hon. T. N. GREEN, Judge, presiding.

MARTIN SHALLENBERGER, FRANK A. KERNS, and B. F. THOMPSON, for appellants.

FRANK THOMAS, and V. G. FULLER, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Upon a final hearing of the issues formed by the amended bill of appellants and the answer of appellees thereto, the circuit court of Stark county entered a decree dismissing the bill for want of equity, and from that decree this appeal was prosecuted.

The appeal was taken to this court on the alleged ground that a freehold was involved in the suit. The complainants in the bill were the appellants, Charles S. Payne and A. G. Hammond, executor of the last will and testament of Elizabeth A. Payne, deceased. The defendants were the appellees, Henry A. White and Nellie T. White, his wife. The purpose of the bill was to cancel an agreement in writing executed by said Charles S. Payne and Elizabeth A. Payne, his wife, as parties of the first part, and said Henry A. White and Nellie T. White, his wife, as parties of the second part, on February 11, 1899, and to remove the record of the same as a cloud upon the title to the real estate therein mentioned and for an injunction and accounting. The bill alleged the execution of the agreement and set out the same, whereby said Charles S. Payne and Elizabeth A. Payne agreed to give one-half of all their real estate in the city of Wyoming, Stark county, Illinois, except the store and fixtures and surroundings pertaining to the store, to the said Henry A. White and Nellie T. White in consideration of the agreement of said Henry A. White and Nellie T. White on their part to take care of said Charles S. Payne and Elizabeth A. Payne during their natural lives, and to take care of and keep in repair, in connection with the parties of the first part, the said property in such a manner as would enhance the value thereof and make it return such profit as to pay all expenses, taxes and encumbrance, and such claims against the parties of the first part, not to exceed \$400, as might be presented. It was also agreed that the parties of the second part should have the right

to move into the house attached to the store and use the same free of rent and use such parts of the building as the parties might agree upon, and that both parties should have an equal interest in the management of all the property. It was alleged that the defendants had failed to perform their agreement to take care of the complainant Charles S. Payne, and of his wife while she lived, and to take care of and keep in repair, in connection with said complainant and his wife, the said property as agreed, and that the agreement had become burdensome and oppressive, and should be declared null and void. At the date of the agreement Charles S. Payne was eighty-one years old and his wife was seventy-nine years of age, and he was eighty-four years old when the bill was filed. The defendants moved into the house connected with the store and boarded Charles S. Payne and wife and collected rents from some of the property. Elizabeth A. Payne died May 9, 1902, leaving a last will and testament devising all her property to her husband, the complainant Charles S. Payne. When the agreement was made she was the owner of three lots, on which the store and fixtures and surroundings were located. The answer of defendants admitted the ownership of the real estate at the date of the agreement by the complainant Charles S. Payne and his wife; admitted the reservation of the store and fixtures and surroundings pertaining to the store, but denied that the three lots mentioned in the bill on which they were located were reserved; admitted the occupation of the house connected with the store, the purchase of household supplies from the store and the collection of money as rent for the opera house, but denied the other allegations of the bill.

Whether a bill to remove a cloud upon title to real estate involves a freehold depends upon the nature of the alleged cloud. A bill to remove as a cloud a deed purporting to convey a freehold estate involves the freehold. So, also, a bill for the specific performance of an

agreement to convey a freehold estate involves the freehold, but an executory or conditional contract for such a conveyance does not necessarily involve such freehold. (*Hutchinson v. Howe*, 100 Ill. 11.) In this case the alleged cloud did not purport to convey the fee which was in complainant Payne. He is not seeking to recover a freehold estate or to set aside an instrument purporting to convey it. No specified time is named in the agreement when the property shall be conveyed, and defendants are not seeking any conveyance or asking any relief, although they insist that they performed their contract up to the time of filing the bill. The contract is a conditional one. If it should be set aside the freehold would remain where it is, and, on the other hand, if it should be held valid and binding the defendants would only become entitled to a conveyance upon performance on their part. If they are entitled to a conveyance they are not seeking a specific performance of the contract, and in any view the freehold is not involved in the litigation. *Kesner v. Miesch*, 204 Ill. 320.

Counsel say the freehold is involved because the answer denied that the lots on which the store, fixtures and surroundings pertaining thereto were situated were included in the reserved property under the description of "the store, fixtures and surroundings pertaining to the store." That denial only raised a question as to the meaning of the language employed in the contract. If it should be held that the lots were included in the reservation they would remain as they are, the property of the complainant Payne, and if they were not reserved they would merely be subject to the contract the same as the other property. The ownership of those lots is not put in issue by the pleadings.

A freehold is not involved in the litigation, and the appeal should have been taken to the Appellate Court. The appeal is dismissed.

*Appeal dismissed.*

CINCINNATI, INDIANAPOLIS AND WESTERN RAILWAY CO.

v.

THE PEOPLE *ex rel.* Taylor Randolph, County Collector.*Opinion filed February 17, 1904.*

1. **TAXES**—*specifying purpose of tax as for "town purposes" is not sufficient.* Specifying the purpose of the tax which is authorized by the electors at the town meeting as for "town purposes" is not sufficient, where there is nothing to show what the purposes were.

2. **SAME**—*electors at town meeting cannot exercise power of board of auditors.* The certificate of the board of town auditors is the basis for the levy of a tax to pay claims and demands against the town, and the vote of the electors at the town meeting cannot be substituted for such certificate.

3. **SAME**—*when record of commissioners may be amended.* On application for judgment of sale for a road and bridge tax, the town clerk who wrote up the record of the meeting of the highway commissioners may testify that the date of the meeting was incorrectly entered by him, where the tax levy certificate made at such meeting is correctly dated.

4. **ROADS AND BRIDGES**—*certificate of levy should show the amounts required.* A certificate of levy for a road and bridge tax, levied under section 119 of the Road and Bridge act, should give the total amount required to be raised, and the specific amounts, for each of the purposes named, which go to make the total.

5. **MUNICIPAL CORPORATIONS**—*a tax levy ordinance must specify in detail the purposes of the appropriations.* An ordinance for the levy of municipal taxes must specify in detail the purposes of the appropriations and the amount appropriated for each purpose.

6. **SAME**—*when tax levy ordinance is invalid.* A tax levy ordinance is invalid where none of the items of the levy agree with those specified in the appropriation ordinance.

APPEAL from the County Court of Jasper county; the Hon. F. D. SHAMHART, Judge, presiding.

The appellant company owns and operates its railway through the townships of Hunt City, Willow Hill, St. Marie, Fox, and the village of Hunt City in Jasper county, which property was duly assessed for taxation for the year 1902 by the State Board of Equalization,

and taxes were extended thereon by the county clerk of Jasper county according to the several certificates of levy for taxes, filed with him for the year 1902. Appellant paid a portion of these taxes, but refused to pay the remainder. The county collector made application to the June term of the county court for judgment, and order of sale of this property for such unpaid taxes, together with interest and costs. The appellant appeared by its counsel, and filed objections in writing to the rendition of judgment for such taxes, interest and costs; the cause was heard by the court at the June term, 1903, and judgment was rendered, sustaining the appellant's objections as to certain taxes not here in controversy, and overruled its objections and rendered judgment against the property of appellant for the following taxes, to-wit: Hunt City township town tax, \$27.96; Willow Hill township town tax, \$45.90; St. Marie township town tax, \$20.91; Willow Hill township road and bridge tax, (as to forty-cent levy), \$36.73; Fox township road and bridge tax, \$16.12; Hunt City village tax, \$39.22. The present appeal is prosecuted from the judgment of the county court as to each of the taxes above set forth.

GEORGE W. FISHER, and DAVIDSON & ISLEY, for appellant.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First—As to the three town taxes.* The town tax for the town of Hunt City was levied upon the certificate of the town clerk, that the board of town auditors in regular annual meeting held September 2, 1902, ordered that the amount of \$400.00 be levied for "town purposes." The record of Hunt City township, containing the minutes of the annual town meeting held on April 1, 1902, shows that, on motion and by vote of the electors, a levy of \$400.00 was made for "town purposes." But it does not

appear what the purposes were, for which the tax was levied or voted. It does not appear that the purpose was to pay claims audited against the town; nor does it appear that the action of the electors at the town meeting was certified by the town clerk in the manner required by law. Consequently, the objection, made by the appellant upon the trial below to the effect that the purpose for which the tax was levied did not appear and it did not appear that the tax was levied for any purpose for which such town was authorized to levy a town tax, should have been sustained. (*People v. Chicago and Alton Railroad Co.* 194 Ill. 51; *People v. Chicago and Alton Railroad Co.* 193 id. 364; *Indiana, Decatur and Western Railway Co. v. People*, 201 id. 351). In the case of *People v. Chicago and Alton Railroad Co.* first above cited, we held that the third subdivision of clause 3 of section 3, article 4, of the Township Organization act, authorizing electors at a town meeting to raise money by taxation "for any other purpose required by law," is not authority for sustaining a tax levied by vote of a town meeting "for town purposes," there being nothing to show the nature of such purposes. It was said in that case, that it must always appear that the purpose, for which the money is to be raised, is one for which the town has authority to raise money by taxation. Such purpose does not here appear.

The same is true as to the certificate of levy for the town tax of the town of St. Marie for 1902, upon which certificate that tax was extended. The certificate shows that, at the annual town meeting held on the first day of April, 1902, a motion was made that a levy of \$200.00 be made for "town purposes," and the motion was carried. The town records, containing the minutes of the annual town meeting of April 1, 1902, show that a levy of \$200.00 was made for "town purposes." As it does not appear what the purposes were, or that the purpose, for which the tax was levied, was one required or author-

ized by law to be carried into execution by the town, the objection, presenting this point in the trial court, should have been sustained upon the authority of *People v. Chicago and Alton Railroad Co. supra.*

As to the town tax of the town or township of Willow Hill, the certificate of the town clerk shows that, at the annual town meeting held on the first day of April, 1902, a motion was made and seconded, and carried, that a tax of \$700.00 be levied for "all town expenses." The town record of Willow Hill, containing the minutes of the annual meeting held on the first day of April, 1902, shows that a motion was made, seconded and carried to make a tax levy of \$700.00 to pay the township indebtedness to Hunt City township on the apportionment of the appraisement, "and other town expenses." There is nothing to show how much of the tax is for the township indebtedness to Hunt City, and how much for "other town expenses." It does not appear that the indebtedness and expenses are legal claims against the town, to which the appellant company should contribute. Nor does it appear that the board of town auditors ever took action on or audited these claims, if they were in fact legal claims against the town. We have held that the duty of passing upon claims and demands against the town is imposed upon the board of town auditors, and their certificate is made the foundation for the levy of taxes to pay such claims and demands. The attempt by the town meeting to exercise the power of the board of auditors is illegal and makes the tax void. (*People v. Chicago and Alton Railroad Co.* 193 Ill. 364; *People v. Chicago and Alton Railroad Co.* 194 id. 51).

*Second*—As to the two road and bridge taxes. The commissioners of highways of Willow Hill township met, as hereafter stated, and made their levies for road and bridge taxes for the year, commencing September 2, 1902; one levy for forty cents on the \$100.00 in manner and form, as is prescribed for the tax under section 119 of

the Road and Bridge act, (2 Starr & Curt. Ann. Stat.—2d ed.—p. 3596), and one levy of twenty cents on the \$100.00 valuation on all real, personal and railroad property to meet the payment of outstanding orders, which was approved by the town auditing board and the assessor. The certificate of levy of the Willow Hill road and bridge tax, showing the levy of a tax of forty cents on the \$100.00, was signed by the three highway commissioners, and filed with the county clerk; and it appears from the face of the certificate that the commissioners of highways of the town of Willow Hill proceeded to ascertain as near as practicable, how much money must be raised in said town by tax on real and personal property for the purposes following during the ensuing year, as required by law, and ascertained and determined the same to be as follows, to-wit: “(1) For the making and repairing of bridges, \$300.00; (2) for the payment of damages by reason of the opening, altering and laying out new roads, \$50.00; (3) for the purchase of the necessary tools, implements and machinery for working roads, \$50.00; (4) purchasing necessary material for building and repairing roads and bridges, \$50.00; (5) for the pay of overseers of highways for the ensuing year, \$150.00; commencing on Tuesday next preceding the annual town meeting; the total amount for the purposes aforesaid being \$600.00; for raising which amount a tax is levied on all the real and personal property in said town, of forty cents on the \$100.00; witness our hands this second day of September, 1902.” We are unable to see why this certificate does not comply with the requirements of section 119 of the Road and Bridge act.

Complaint is made by counsel that the commissioners made one levy of forty cents, as shown by their certificate, and then proceeded under section 14 of the Road and Bridge act (3 Starr & Curt. Ann. Stat.—2d ed.—p. 3532), to make another levy of twenty cents for specified purposes, which was granted by the town auditing board

and the assessor; and that the tax was extended at the rate of sixty cents, to get which the commissioners did not proceed according to either system, (that is to say, there being towns adopting the labor system and towns not adopting such system,) but according to both systems; and it is also contended that there were two distinct and separate levies in one year, which, as it is claimed, is not authorized by the statutes. (*St. Louis Nat. Stock Yards v. People*, 127 Ill. 22.) Without passing upon the validity of this contention, it is sufficient to say that the court held the twenty-cent levy bad, but the forty-cent levy good, and apportioned the taxes accordingly. If, therefore, the tax was improperly extended at the rate of sixty cents, the court held the levy of twenty cents on the \$100.00 valuation, in addition to that of forty cents on the \$100.00 valuation, to be invalid. The case, therefore, stands as a levy of forty cents only, and not of sixty cents. As a levy of forty cents it is in compliance with the statute and is valid.

But counsel say that the record of the commissioners of highways of Willow Hill township, containing the minutes of the meeting of the commissioners, at which the levy was made for road and bridge taxes for the year 1902, shows that such meeting was held on the first day of September, 1902, at the town house in Willow Hill. It is conceded that the first day of September, 1902, was Monday, and that the second day of September, 1902, was Tuesday; and it is claimed that, therefore, the meeting was held upon the wrong day, as the meeting could only legally be held on the first Tuesday in September, 1902, which was the second day of the month, and not upon Monday, the first day of September, 1902. It may be admitted that the proper day for the holding of the meeting was Tuesday, the second day of September, 1902. The record of the commissioners of highways of Willow Hill township was written up by the town clerk of the township, whose name was H. J. Foltz. Foltz testified

upon the hearing that the record was not correct, and that he made a mistake in stating that the meeting was held on the first day of September, and that, as matter of fact, it was held on Tuesday, the second day of September, 1902. It is contended that the court erred in admitting the oral testimony of the town clerk for the purpose of correcting or amending the record. The action of the trial court in thus permitting the record to be amended is justified by the terms of section 191 of the Revenue law of this State. (3 Starr & Curt. Ann. Stat.—2d ed.—p. 3471). That section makes liberal provision for the correction of irregularities and omissions in proceedings of officers, connected with the assessment and levying of taxes, which do not affect the substantial justice of the tax itself, and those provisions are broad enough to justify the admission of the parol testimony introduced in this case. Whether the admission of such testimony would have been proper, if there had been nothing in the record to amend by, is a question, which does not here arise, and need not be passed upon. Section 119 of the Road and Bridge act provides that the tax levy certificate, or statement to be made by the commissioners of highways, shall be signed by the commissioners, or a majority of them. Here, the tax levy certificate, or statement, made by the commissioners, was signed by three commissioners and witnessed under their hands, as of the date of September 2, 1902, which day was Tuesday. Inasmuch as the commissioners themselves, under their own hands, certified that their action in ascertaining how much money was to be raised for the required purposes was taken on September 2, and so certified in writing, the record, as written by the town clerk, could be amended in accordance with such written certificate of the commissioners. In other words, the amendment of the record by changing the date from September 1 to September 2, was justifiable, because there was the written certificate of the commissioners to amend by.

We are, therefore, of the opinion that the Willow Hill township road and bridge tax, being based upon a forty-cent levy only, is valid.

The road and bridge tax of the town of Fox was properly objected to, and the objection should have been sustained. The certificate of levy, as to the town of Fox road and bridge tax, shows that the levy was made under section 119 of the Road and Bridge law, and was made at a meeting of the commissioners held on March 25, 1902. By that certificate, the commissioners of highways of said town of Fox state that, "having proceeded to ascertain, as near as practicable, how much money must be raised in said town by tax on real and personal property for the purposes following, during the ensuing year, as required by law, have ascertained and determined the same to be as follows, to-wit: (1) For the making and repairing of bridges, \$.....; (2) for payment of damages by reason of the opening, altering and laying out of new roads, \$.....; (3) for the purchase of the necessary tools, implements and machinery for working roads, \$.....; (4) for the purchase of necessary material for building and repairing roads and bridges, \$.....; (5) for the pay of overseers of highways for the ensuing year, \$.....; commencing on Tuesday next preceding the annual town meeting; the total amount for the purposes aforesaid being .....dollars; for the raising of which amount a tax is levied on all the real and personal property in said town of forty cents on the \$100.00; witness our hands this 25th day of March, 1902." This certificate is signed by the three commissioners of highways, but it does not give the amounts to be raised for the various purposes mentioned in the certificate or statement, nor does it give the total amount, which is to be raised. Section 119 of the Road and Bridge act requires, not only that the total amount to be raised shall be stated in the levy certificate, but that the specific amounts for each one of the objects named should be stated. The certificate

is fatally defective in failing to give the total amount, or the specific amounts making up the total sum. The town clerk of the town of Fox testifies that the records of the town are in his custody, and that the record of the commissioners of highways shows that all the amounts, specific and total, in the statement or certificate, are blank, as above indicated. He swears that the original certificate of levy was lost, and that he sent a copy to the county clerk, and that the copy was not signed by the commissioners. There is no evidence, however, to show that the original certificate, which is said to have been lost, contained the amounts, which are omitted from the certificate as it appears in the present record. So far, therefore, as the road and bridge tax of the town of Fox is concerned, the objection was well taken, and should have been sustained.

*Third—As to the village tax,* the objection should have been sustained for the reasons hereinafter stated. The appropriation ordinance for the municipal year 1902 of the village of Hunt City was passed on July 7, 1902, and shows there was an appropriation of \$500.00 for streets and alleys, \$250.00 for salaries, \$200.00 for "miscellaneous," and \$50.00 for elections, amounting altogether to \$1000.00. The levy ordinance, which was passed on the first day of September, 1902, provides "that there shall be levied, assessed and collected upon the personal and real property within the corporate limits of the village of Hunt City, as the same is or may be returned by the assessor of said village for the year 1902, the sum of \$175.00 for 'general, contingent and miscellaneous purposes,' making a total aggregate sum to be levied, assessed and collected of \$175.00." The certificate of the village clerk certifies that a tax of \$175.00 was levied for "general, contingent and miscellaneous purposes, making a total aggregate sum to be levied, assessed and collected of \$175.00." Neither of the three distinct purposes, for which the levy of the gross sum of \$175.00 was

to be made, except "miscellaneous," is mentioned in the appropriation ordinance. None of the items of the levy ordinance agree with the appropriation ordinance. The board of trustees did not "ascertain the amount of appropriations heretofore legally made and levy same," as required by section 111, chapter 24, Revised Statutes of Illinois; and did not "specify in detail the purposes for which appropriations were made, and the sum or amount appropriated for each purpose respectively." We have held that the statute requires that a city ordinance for the levy of municipal taxes shall specify in detail the purposes for which the appropriations are made and the amount appropriated for each purpose. (*People ex rel. v. Peoria, Decatur and Evansville Railroad Co.* 116 Ill. 410).

The judgment of the county court is affirmed so far as it overruled the objection to the entry of judgment upon the Willow Hill township road and bridge tax amounting to \$36.73; but said judgment is reversed so far as it overruled the objections to the other town, road and bridge, and village taxes hereinbefore mentioned. In pursuance of section 192 of the Revenue act (3 Starr & Cur.—2d ed.—p. 3478,) a judgment will be rendered in this court for \$36.73 with ten per cent damages on such amount; and it is ordered that so much of the amount deposited by appellant with the collector upon the taking of this appeal as shall be necessary to pay and satisfy said judgment, be credited upon the same, and that execution issue for any balance remaining unpaid. The clerk of the court will enter judgment accordingly and transmit to the county collector a certified copy of the same.

*Affirmed in part and reversed in part, and  
judgment rendered in this court.*

## THE PRESSED STEEL CAR COMPANY

v.

JOHN R. HERATH, Admr.

*Opinion filed February 17, 1904.*

207	576
214	185
207	576
e115a	222

1. MASTER AND SERVANT—*when master is liable for injury to servant who obeyed command.* Where the servant is ordered by the master to work in a place known by both of them to be in a degree dangerous, the master will be liable for a resulting injury to the servant, unless the danger was so great that an ordinarily prudent person would have refused to obey the order, which is a question for the jury under the evidence.

2. VARIANCE—*objection of variance cannot be first raised on appeal.* An objection of a variance between the declaration and the proof cannot be raised for the first time on appeal.

*Pressed Steel Car Co. v. Herath*, 110 Ill. App. 596, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

WINSTON, PAYNE & STRAWN, (JOHN BARTON PAYNE, and RALPH M. SHAW, of counsel,) for appellant.

J. L. O'DONNELL, and BARR, BARR & BARR, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

A portion of the roof of a building belonging to the appellant which had been partially destroyed by fire, and which the appellee's intestate, Henry W. Smith, and other workmen of the appellant company, were engaged in removing, fell upon said Smith and instantly killed him. In an action on the case in the Will circuit court the appellee administrator was awarded judgment in the sum of \$2000, on the ground the death of his intestate was attributable to actionable negligence on the part of a

vice-principal of the appellant company. The Appellate Court for the Second District affirmed the judgment on appeal, and the appellant company has perfected this its further appeal to this court.

At the close of all the evidence the appellant company moved the court to instruct the jury before whom the case was heard, to find the issues in its favor and return a verdict of not guilty. The court declined to grant the instruction, and such refusal constitutes the sole ground urged for reversal of the judgment.

The building was a large structure, three hundred and twenty feet long from east to west and eighty feet wide. It was covered with two gabled roofs running lengthwise with the building, supported in the center by iron columns each twenty feet apart. Large wooden trusses, shaped like an inverted V, the inner ends of which rested on the tops of the columns and the outer ends on the walls on either side of the building, rose to the apex of the roofs. The rafters extended lengthwise of the building from truss to truss, and at either end entered a mortice in the truss. They were covered with a sheeting of plank, on which was laid a roofing of corrugated iron. The framework of the roof was therefore in sections, extending from truss to truss, a distance of twenty feet, and from the outer wall to the valley in the center of the building. In the center of the building, at the eaves of the two roofs, there had been constructed a valley or gutter of galvanized iron two feet in width and six inches deep, into which the water from the inner slopes of each of the gable roofs was discharged. The building had been quite seriously damaged by fire, which burned away some of the rafters and in other respects so damaged the roofs that it was found necessary to tear them away in order that the building might be re-roofed. The work was performed by causing the sections of the roof between the trusses to fall to the floor of the building. On the 26th day of February, 1901,—the day when Henry W.

Smith, appellee's intestate, met his death,—the roof had been taken down except three sections at the westerly end of the building. Smith had not been engaged in the work until the day he was killed. He began work about seven o'clock in the morning and was killed at about the hour of eleven o'clock in the same forenoon. He saw but one section of the roof removed,—the third from the west end. The section was caused to fall in the following manner: A large, strong pole, called a "gin pole," was raised from the floor to the apex of the truss, and the truss was firmly lashed to this gin pole. Carpenters then went upon the roof with axes and saws and cut or sawed away the ends of the rafters which entered the mortices in the easterly truss. The pressure of the ends of the rafters and of the sheeting against the truss would still probably support the easterly part of the roof. A block and tackle were attached to the topmost point of the gin pole above the apex of the roof, by means of which the gin pole, and the truss which was lashed to it, could be lifted upward and slightly away from the roof, thus removing the support for the easterly end of the section of the roof. Thereupon the east end of the section would drop, and its weight would pull the remainder of the section to the floor. The deceased saw the third section removed in this manner and he assisted in clearing away the debris from the floor. While he and his fellow-workmen were engaged in clearing away the debris the gin pole was erected and lashed to the easterly truss of the second section of the roof, and carpenters were sent on the top of the roof to cut and saw away the easterly ends of the rafters of the second section of the roof. When the sections of the roof fell, they usually brought with them the portion of the iron guttering in the center of the building to which the section was attached, but a considerable portion of the guttering did not come down with the third section, but remained only partially detached from its original position. After the debris of the third

section had been removed, appellant's foreman caused a rope to be attached to this portion of the gutter, and ordered the workmen, including the appellee's intestate, to take hold of the rope and pull the guttering down. He placed these workmen with the rope so they would be east of and not under the second section of the roof and south of the guttering, but they were unable to pull away the guttering from that point, and he directed them to take the rope and go to the west and pull on it. This caused the workmen to pass under the second section of the roof, the easterly ends of the rafters of which had been cut away. When near the west door the foreman signaled the men to pull on the rope, and they did so two or three times, and while so engaged a portion of the easterly part of the second section of the roof came down and fell upon appellee's intestate and killed him.

The part of the roof which fell was some distance from the guttering which the workmen were attempting to pull down, and we find nothing in the testimony tending to show that this part of the roof was caused to fall by the efforts of the workmen to bring down the guttering. It was, we think, clearly shown that the foreman and the workmen, including appellee, understood that any section or part of a section might fall at any time after the points of the rafters had been sawed or cut away from the trusses, though it was the expectation of all that in order to bring down the section after the rafters had been cut away, it would be necessary to move the truss by means of the gin pole.

The contention of the appellant company is, that the falling of the roof, or parts of it, was one of the ordinary dangers incident to the work which the deceased had undertaken to perform; that the rule that it is the duty of the master to furnish the servant a reasonably safe place in which to work could not apply, because the work of demolishing the roof was inherently dangerous and made dangerous the place where the servants must

work, and the employee must, of necessity, assume the ordinary dangers incident to the undertaking in which he voluntarily engaged; that the deceased had full knowledge of all the dangers of the work, and that it should have been declared, as a matter of law, that his death was caused by a peril that was ordinarily incident to his employment and was assumed by the servant, and hence that the master could not be held liable in the action.

There is no direct proof that the deceased knew that the rafters of the second section had been cut or sawed away, but the work of cutting and sawing the rafters had been done in his sight and hearing, and it was proven that he had been for a time stationed at the proper point and ordered to keep workmen and other persons from going under the second section of the roof because there was danger it might fall. The foreman of the appellant company realized that the second section might fall at any time, the rafters, as he knew, having been cut away. We think the deceased had the same knowledge. But we think it equally clear that both the employer and the employee believed the section of the roof would remain in place until the truss should be moved so the roof would no longer be supported by it. Under these circumstances, and with the knowledge on the part of both employer and employee, the foreman ordered the employee and his fellow-workmen to go beneath the second section of the roof, and in obedience to the command of the master the deceased went into a place which he knew to be, in a degree, dangerous, and was killed. It is the primary duty of an employee to obey the commands of his employer. If ordered to perform an act which he knows is attended with danger, he is called upon to decide whether he will be justified in refusing to obey on the ground that the perils of obedience are too great. In this dilemma the law requires of him to act with that degree of prudence that would have controlled an ordinarily prudent, careful and discreet man.

The fear of losing employment will not justify him in rashly and recklessly exposing himself to known danger. An inconsiderate and improper order given by the master may constitute actionable negligence, and the master may not always be allowed to escape liability on the ground the servant should have disobeyed his order and not exposed himself to danger which attended compliance therewith. The principle is thus announced in *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, (on p. 583): "Questions arise whether the action of a servant is his voluntary act, or done in obedience to the commands of the master or one in authority over him. When an act is performed by a servant in obedience to a command from one having authority to give it, and the performance of the act is attended with a degree of danger, yet in such case it is not requisite that such servant shall balance the degree of danger, and decide with absolute certainty whether he must do the act or refrain from it; and his knowledge of attendant danger will not defeat his right of recovery, if, in obeying the command, he acted with that degree of prudence that an ordinarily prudent man would have done under the circumstances." In *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, it was said (p. 459): "In the next place, a master is liable to a servant when he *orders* the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Even if the servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. \* \* \* The master and servant are not altogether upon a footing of equality. The primary duty of the latter is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts recklessly in so obeying. Whether he acted thus recklessly in obeying his master's order or whether he acted as a reason-

ably prudent person should act are questions of fact to be determined by the jury."

The application of this principle to the conceded facts of the case correctly led the trial court to the conclusion that it could not be declared, as a matter of law, that the appellant company was not liable to respond in damages for the consequences which resulted from the order of its foreman, which was clearly inconsiderate and negligent. The deceased knew that in obeying the order and going beneath the second section of the roof he was exposing himself to a possible danger, but the order did not require him to remain under the section longer than was necessary to pass under it. The evidence tended to show that he knew that it was not likely the section of the roof would fall until the truss at the eastern end thereof had been moved by means of the tackle and pulley, which were attached to the gin pole for the express purpose of moving the truss and causing the sections to fall. It was therefore a question of fact for the determination of the jury whether the degree of known danger which attended compliance with the order of the representative of the appellant company was so great that an ordinarily prudent workman should have disobeyed the order.

It is urged there is no count in the declaration upon which, under the evidence, the appellee was entitled to recover. There was no demurrer to the declaration, and the insistence is that the judgment should be reversed because of a variance between the pleadings and the proof. The objection of a variance was not specifically raised in the trial court, where, if well taken, it could have been obviated by an amendment. It cannot be invoked in this court.

The judgment must be and is affirmed.

*Judgment affirmed.*

CLARA J. HARRIS  
v.  
CATHARINE F. DUMONT *et al.*

*Opinion filed February 17, 1904.*

1. FRAUD—*what a false representation within the meaning of the law.* A promise to marry, accompanied by a false representation that the promisor is an unmarried man, upon the faith of which the promisee was induced to make an exchange of lands with the promisor, constitutes a fraud, against which equity will grant relief.

2. APPEALS AND ERRORS—*a party cannot complain of an error not prejudicing his interest.* One whose entire interest in property is divested by a decree restoring the property to the original owner on the ground of fraud, cannot urge as error that the decree enforced certain mechanics' liens against the property.

WRIT OF ERROR to the Circuit Court of Hamilton county; the Hon. P. A. PEARCE, Judge, presiding.

This litigation includes three separate and independent proceedings. On June 15, 1897, the defendant in error, Catharine F. Dumont, filed her bill in the circuit court of Hamilton county against John W. Harris, the husband of the plaintiff in error, Clara J. Harris, Rachael T. Goodwin, the mother of Clara J. Harris, M. H. Mundy and M. J. Boyd, which bill, by leave of court, was amended on March 16, 1898, by making Clara J. Harris a party defendant thereto. The bill, so filed, charges fraud, and asks for a decree, canceling and annulling the deeds and mortgages upon the farm of 350 acres, described in the bill. Separate answers were filed to this bill by all the defendants. On July 6, 1897, John W. Thompson filed a petition in the same court to enforce a mechanic's lien against said farm, making said Boyd, Mundy, Catharine Dumont, John W. Harris and others parties thereto. Answers were filed to this petition, which was a petition for a mechanic's lien for work and labor done in building a house upon said farm. Therein also, to the September

term, 1897, of the court, an intervening petition was filed by Thomas B. Wright and John W. Wright, as partners, also claiming a mechanic's lien on account of materials, furnished to said Thompson for the construction of said house. On January 7, 1898, the plaintiff in error, Clara J. Harris, filed a bill in said court to foreclose two mortgages, executed by Rachael T. Goodwin, one for \$1100.00 to Mrs. M. J. Boyd, and the other for \$5000.00 to M. H. Mundy upon said farm of 350 acres, which mortgages are alleged to have been assigned to plaintiff in error, Clara J. Harris. To this bill to foreclose Rachael T. Goodwin, Catharine F. Dumont, John Thompson, John W. Harris, T. B. Wright, John W. Wright, and others, were made defendants. Answers were filed by Catharine F. Dumont and John Thompson to the bill to foreclose. After the original proceeding to set aside the deeds and mortgages on account of fraud, and the proceeding to foreclose the mortgages, and the proceeding to enforce the mechanics' liens were at issue by the filing of replications to the answers, the three proceedings were consolidated, and heard together.

On September 28, 1898, a decree was rendered, granting the relief asked for in the original bill, setting aside the deeds and mortgages therein mentioned as fraudulent and void, dismissing the suit to foreclose the mortgages, and finding liens in favor of the petitioning creditors in accordance with the prayers of their petitions. The present writ of error was sued out on June 30, 1903, for the purpose of reviewing the decree, so entered by the circuit court of Hamilton county, it being sued out within about three months of the expiration of the five years, allowed by the statute for taking out a writ of error.

The original bill, filed by Catharine F. Dumont, alleges that she was unmarried, and a widow, and the owner of a farm, containing 350 acres more or less in Hamilton county; that about January 1, 1897, John W. Harris conceived the purpose of defrauding her by ob-

taining title to said farm through false and fraudulent pretenses and representations; that said Harris was, and still is, a married man, living in Evansville, Indiana, of good address, agreeable manners, "a smooth scoundrel" capable by falsehood and deceit of winning her confidence; that, with intent to cheat and defraud her out of the title to said land, he proposed marriage to her; that she, being deceived by his false representations in which she confided, and not knowing his ulterior purpose to cheat, accepted his proposition, not knowing that he was a married man, and agreed within a reasonable time to marry him; that, immediately after obtaining her promise, he insisted that she should sell and dispose of her real estate, and represented that, upon their marriage, they would reside in Evansville, Indiana; that he represented that he had great wealth, and that, after their marriage, it would be undesirable to have land in Hamilton county; that, relying upon his integrity, she agreed with him to exchange said farm in Hamilton county for real estate in Huntingburg, Indiana; that, at his instance, on January 23, 1897, she executed a deed, conveying the said farm to Rachael T. Goodwin of Wabash county, Illinois, and delivered said deed to said John W. Harris, and received from him a deed, executed by Rachael T. Goodwin, dated January 25, 1897, conveying to Catharine F. Dumont real estate in Huntingburg, Indiana; that, as to the value of the latter, she relied upon the fraudulent representations of said Harris; that said Goodwin was a relative of his and conspiring with him to cheat and defraud her; that, on February 1, 1897, he procured the said Goodwin to make a fraudulent mortgage on the farm of 350 acres to one M. J. Boyd for the pretended consideration of \$1100.00 to become due in five years, which was filed February 16, 1897; that, to further carry out his fraudulent scheme, he procured said Goodwin on February 13, 1897, to execute and deliver to one M. H. Mundy a fraudulent mortgage on said farm for

\$5000.00 to become due in five years, which was recorded on February 15, 1897; that both said mortgages were without valuable consideration, and made at the instance of Harris for the purpose of cheating and defrauding her, and were received by said Boyd and Mundy knowingly for the same purpose; that said Harris, in pursuance of his intention to defraud her, falsely represented that, if she would convey to him the Huntingburg property, he would convert it into \$3500.00 cash; that, expecting to marry him soon and relying on his promise, and being deceived and duped, she conveyed to him the Huntingburg property, a few days after it had been conveyed to her, for the purpose of having it converted into said sum of money, but he did not so convert it, but, conspiring with said Mundy to defraud her, procured a deed from Mundy and his wife to be made to her, conveying to her 160 acres of land in Nevada county, Arkansas, for a pretended consideration of \$3500.00; that she received said deed to the Arkansas land, and returned to said Harris his note for \$3500.00, which she held for the Huntingburg property; that said Harris and Mundy represented to her that said Arkansas land was well worth \$3500.00, when in fact it was almost worthless, and was used in pursuance of a scheme to defraud her out of the Hamilton county farm; that she offers to re-convey to said Mundy said Arkansas land; that, on June 14, 1897, said Harris obtained a fraudulent deed from said Goodwin to himself of all of said Hamilton county land, being 350 acres, and the said Huntingburg property; that Harris, Goodwin, Mundy and Boyd, in relation to said deeds and mortgages, separately and together conspired to defraud her; that the said transactions and conveyances were the results of such conspiracy; the bill prays that the deed of January 23, 1897, by which she conveyed the Hamilton county land be annulled, and that said mortgages made by Goodwin to Boyd and Mundy be annulled; that said deed, dated June 14, 1897, made by Goodwin to Harris,

conveying said 350 acres, be annulled, etc., and for general relief, etc. The final decree of the court found substantially in accordance with the prayer of the bill, and decreed that the deed of the 350 acres to Rachael T. Goodwin, and the deed of the same land, made by Mrs. Goodwin to John W. Harris, were null and void, and that the mortgages to Mrs. Boyd and Mr. Mundy were void and inoperative; that Catharine F. Dumont was the owner of the Hamilton county real estate, and should be let into possession thereof, etc.

E. B. GREEN, and THEODORE G. RISLEY, for plaintiff in error.

T. B. STELLE, LEONIDAS WALKER, and JOHN R. CROSS, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In considering the question, whether or not the decree, entered by the circuit court, was correct, we will refer only to the reasons urged by the plaintiff in error, Clara J. Harris, why the decree should be reversed, and in the order in which those reasons are presented in the argument of counsel.

*First*—It is contended by counsel for plaintiff in error, that there was no equity on the face of the bill, filed below by defendant in error, Catharine F. Dumont, upon the alleged ground that she did not, upon the discovery of the alleged fraud, before filing her bill, offer to convey back to Rachael T. Goodwin the Huntingburg property, received by her in exchange for the Hamilton county farm. In other words, it is said that there was no offer in her bill to place Mrs. Goodwin *in statu quo*. In support of this contention the rule is invoked that, before a court of equity will rescind an exchange of lands, or a sale of lands, on the ground of fraud, it must be averred and proven that the party, seeking the relief, has offered, and

is ready and able, to place the other party *in statu quo*. (*Brady v. Cole*, 164 Ill. 115; *Dowden v. Wilson*, 108 id. 257).

We are of the opinion that, under the facts of this case, it was not necessary for the defendant in error, Dumont, to restore to Rachael T. Goodwin the Huntingburg property. The bill offers to re-convey to Mundy the Arkansas property; and the decree requires Mrs. Dumont to execute to John W. Harris a deed, conveying to him the Arkansas land, and also orders her to deposit the deed and the sum of \$92.51, paid to her, with the clerk of the court within thirty days. This was the only requirement, which it was necessary to make of her, in order to do complete justice.

John W. Harris induced Mrs. Dumont, a widow with two children, to deed her farm of 350 acres, worth about \$5000.00 to Mrs. Rachael T. Goodwin, his mother-in-law, in exchange for certain lots in Huntingburg, Indiana. There is testimony, tending to show that, at the time of the exchange in January, 1897, the Huntingburg property was worth only about \$500.00, and there is other testimony, tending to show that it was worth from \$3000.00 to \$4000.00. The court below in its decree found that the Hamilton county farm was worth about \$3500.00, and the Huntingburg property was not worth over \$500.00. While the evidence upon this subject of value was conflicting, we see no reason for disturbing the finding of the court below. But we do not regard the comparative values of the Hamilton county land and the Huntingburg land as being important factors in this case.

When John W. Harris induced Mrs. Dumont to consent to the exchange, the title to the Huntingburg property was in Clara J. Harris, the wife of John W. Harris. On January 22, 1897, just after Mrs. Dumont's consent to the exchange, the Huntingburg property was conveyed by Clara J. Harris and John W. Harris, her husband, to Rachael T. Goodwin, the mother of Mrs. Harris. On the next day, January 23, 1897, Mrs. Dumont, at the instance

of Harris, conveyed her farm to Rachael T. Goodwin. Mrs. Dumont swears that Harris told her that he was an unmarried man. Harris denies that he represented to her that he was an unmarried man. They contradict each other directly as to this representation. But there are many circumstances, developed by the evidence, which tend to confirm the statement of Mrs. Dumont upon this subject. One of them is the fact that, as soon as the exchange was agreed upon, Harris and his wife conveyed the Huntingburg property to Mrs. Goodwin, and then Mrs. Goodwin made the conveyance to Mrs. Dumont. As the title was in Mrs. Harris, there is no reason why Harris and his wife should not have conveyed the Indiana land directly to Mrs. Dumont, if it was not his purpose to conceal from her the fact that he had a wife. She would have discovered his marriage, if he had tendered her a deed, executed by himself and Mrs. Harris. The fact, that he caused the title to be conveyed to his mother-in-law and to be deeded by the latter to Mrs. Dumont, would indicate an intention to conceal the fact of his marriage. But on March 2, 1897, Harris induced Mrs. Dumont to convey to him the Huntingburg property, and, in exchange for such conveyance, he gave to her his personal note for \$3500.00, or, according to some of the testimony, for \$3000.00. After having induced her to deed to him the Huntingburg land in exchange for his personal note, he then, on March 15, 1897, induced her to surrender to him his note, and to take in exchange for it a deed of 160 acres of land in Arkansas. This deed was executed to her by a lawyer by the name of M. H. Mundy. The title to the Arkansas land, it appears, had been conveyed to Mundy by Harris, and it is claimed that Harris and Mundy each owned an undivided half of the Arkansas land. It is proven beyond question, that this Arkansas land was worth only from fifty to seventy-five cents per acre, that is to say, from \$80.00 to \$120.00. It is shown by a letter, written by Harris to Mrs. Dumont, and by

other testimony, that he falsely represented to her that a man, named Wilkinson, had offered \$2750.00 for this Arkansas land. Wilkinson, however, in a letter, written by him and dated May 23, 1897, advises Mrs. Dumont to keep the letter Harris wrote to her as evidence of fraud, and denounces Harris as "a liar and a thief."

It thus appears that Harris himself obtained the title to the Huntingburg land, and that Mrs. Dumont in fact received nothing in exchange for her farm, except the Arkansas land, which was worth only from \$80.00 to \$120.00. When, therefore, she tendered to Harris a deed of the Arkansas land, she offered to restore all that she had, as matter of fact, received, except a small amount of money, which the court also required her to deposit in court. The evidence shows that Mrs. Goodwin had no interest in this transaction, except that she was entitled to the right to live on the Indiana land during her life. The evidence is conclusive to our minds that, in all these matters, John W. Harris was acting as the agent and representative of his wife and of his mother-in-law, and that they were mere tools in his hands to carry out his plans, and obey his instructions. They must be held responsible for what he did. He swears himself that he acted in their behalf. While, therefore, the title to the Indiana lots was not actually conveyed back to Mrs. Goodwin, it was conveyed to her agent, John W. Harris.

*Second*—It is claimed, on the part of plaintiff in error, that this transfer or exchange of lands cannot be rescinded by Mrs. Dumont, upon the ground that he made no representation of an existing fact, but merely made a promise as to what he would do in the future. In other words, it is said that he promised to marry her, and take her to a comfortable home in Evansville where she would no longer need the Hamilton county lands, and that this constitutes no fraud, upon the alleged ground that a false representation, within the meaning of the law, must be as to a past or present state of facts, and not merely as

to an intention to do something in the future. (*Haenni v. Bleisch*, 146 Ill. 262; *Murphy v. Murphy*, 189 id. 360; *Brady v. Cole*, *supra*). We have no fault to find with the doctrine, thus invoked, that the false representation must be as to an existing or past fact, and not merely a promise to do an act in the future. But, in the case at bar, there was not merely a promise to marry the defendant in error, Dumont, at a future time, but there was a false representation by Harris as to an existing fact. That is to say, being a married man, he represented it to be a fact, that he was an unmarried man. It was upon the false representation of the existing fact as to his marriage, or non-marriage, that her promise to him was based. It cannot, therefore, be said that here was merely a representation as to what he intended to do in the future, but he went further and falsely represented that he was an unmarried man, and thereby gained her confidence.

Not only did Harris obtain the Huntingburg property for himself by inducing Mrs. Dumont to convey it to him, but he also obtained the title to the Hamilton county farm, because it appears that, on June 14, 1897, that farm was deeded to him by Mrs. Goodwin; so that he finally himself obtained the title to both pieces of property, involved in the exchange.

*Third*—It is claimed on the part of the plaintiff in error that the court below erred in dismissing the bill to foreclose the two mortgages, executed by Mrs. Goodwin to Mrs. Boyd and M. H. Mundy. As to the mortgage for \$5000.00 to Mundy, there was no consideration for it whatever, and, very soon after obtaining it, Mundy transferred the mortgage and the note for \$5000.00, secured thereby, to Mrs. Harris. He says himself in his testimony that he had no interest in the note or mortgage, and took it because Harris requested him to do so, and assigned it to Mrs. Harris because Harris requested him to do so. As to the mortgage for \$1100.00, made to Mrs. Boyd, that mortgage also was transferred by Mrs. Boyd

to Mrs. Harris. There may have been some money advanced upon this mortgage by Mrs. Boyd to Harris, or his wife, or Mrs. Goodwin, but the testimony shows that a mortgage was executed to Mrs. Boyd upon the Huntingburg land, as a substitute for the mortgage upon the Hamilton county land. Although the mortgage for \$1100.00 on the Hamilton county farm was not actually released, yet the testimony tends to show that it was paid, either in money, or by a mortgage upon the Indiana land, or by the personal obligation of Mrs. Harris. We are of the opinion that the chancellor below correctly decided that these mortgages were fraudulent, and that their execution was merely a part of the scheme to defraud the defendant in error, Catharine F. Dumont. The decree therefore properly directed that the bill to foreclose should be dismissed.

*Fourth*—The plaintiff in error complains of the decree, so far as it enforces the mechanics' liens in favor of the parties, furnishing labor and material to construct a house upon the farm in Hamilton county. It appears that, at some time during the progress of these transactions, the house, which had been occupied by Mrs. Dumont upon the farm, was burned down, and Thompson was employed to build a house, and Wright and his son furnished the material for its construction. Whether this part of the decree, enforcing the mechanics' liens claimed by the petitioners, is correct or not, it is not necessary to decide. Inasmuch as the decree restores to Mrs. Dumont her farm of 350 acres, and forbids the foreclosure of the mortgages against it, it can make no difference to the plaintiff in error, Clara J. Harris, whether the decree enforcing the mechanics' liens is correct or not. She has no interest in that matter, inasmuch as she is held to have no interest in the property against which the liens are enforced. The defendant in error, Catharine F. Dumont, does not complain of the decree enforcing the mechanics' liens, and assigns no cross-errors in rela-

tion thereto. If she chooses to take her property back, subject to the decree enforcing these liens, it is a matter, which has no concern for the plaintiff in error, and of which the plaintiff in error cannot complain. Counsel for plaintiff in error, in their brief, say: "So far as the plaintiff in error, Mrs. Clara J. Harris, is concerned, the decree of the circuit court, awarding a mechanic's lien on the Hamilton county lands, is a matter of no interest to her, unless the decree, rendered on the bill of Catharine Dumont, and on her bill to foreclose the mortgages, shall be reversed, or modified, so as to protect the mortgages, one or both." The law does not permit a litigant to complain of an error, which does not operate to the prejudice of the litigant complaining.

We discover no good reason for disturbing the decree, entered by the chancellor upon the hearing had in the lower court. Accordingly, the decree of the circuit court of Hamilton county is affirmed.

*Decree affirmed.*

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## THE CONSOLIDATED COAL COMPANY OF ST. LOUIS

v.

CHARLES P. FLEISCHBEIN, Admr.

*Opinion filed February 17, 1904.*

1. FELLOW-SERVANTS—*when question of fellow-servants is for jury.* The question of the existence of the relation of fellow-servants in a particular case is one of fact for the jury, under the instructions of the court as to the law, where the evidence is conflicting as to the facts upon which the alleged relation is based.

2. SAME—*what does not necessarily establish relation of fellow-servants.* That a pit-boss in a mine, in his effort to hasten delivery of coal, drives one string of cars himself, does not necessarily make him, as to such work, the fellow-servant of another driver to whom he gives an order, on reaching a certain point, to "come ahead," in obeying which order the driver is killed by colliding with a car which the pit-boss had dropped from his string.

*Consolidated Coal Co. v. Fleischbein, 109 Ill. App. 509, affirmed.*

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. M. W. SCHAEFER, Judge, presiding.

This is an action, brought by appellee against the appellant company to recover damages for the death of appellee's intestate, Robert Bowen, which occurred while said Bowen was at work for the appellant company in its coal mine, known as the "Richland mine," on the Illinois Central railroad between the city of Belleville and the village of Freeburg in St. Clair county. The trial was before the court and a jury, resulting in a verdict in favor of appellee, as administrator, for \$3000.00. Motion for new trial was overruled, and judgment was rendered upon the verdict. An appeal was taken to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The second amended declaration consisted of four counts. The third and fourth counts were taken from the jury by the court, and the cause was submitted on the first and second counts, to which the general issue of not guilty was pleaded. The first and second counts are substantially the same, and, as is said by the Appellate Court, "charge the appellant with negligence in the act of its manager or foreman in permitting a loaded coal box or car to be and to remain on the tramway or track in appellant's coal mine, whereby a collision occurred with certain other cars, driven by appellee's intestate, causing his death."

The facts, as stated by the Appellate Court in their opinion deciding this case, are substantially as follows:

"Through an entry leading from the bottom of the shaft to the working rooms, a distance of eleven hundred feet, was a track or tramway, over which ran the cars, used in moving the coal taken from the mine. Near the

working rooms is a switch, called a 'parting,' connecting the room tracks with the main or entry track. Mules were used in moving the cars. Robert Bowen, the deceased, was an entry driver, whose duty it was to haul the cars between the switch and the bottom of the shaft. The room drivers brought the loaded cars from the rooms to the switch. Peter Zink was pit-boss and mine manager. Proof is made that, on the day of the injury, Zink, the manager, came to the switch where the trains or loads were made up for conveyance to the bottom of the shaft, complained that the coal was not moving fast enough, hitched a mule to a load of four cars, and started down the entry for the shaft. From the switch there is a sharp decline in the entry track for a distance of seventy-five or one hundred feet, and, in going down, it is necessary to 'sprag' the wheels, in order to control the speed of the cars. Near the foot, and beyond this steeper grade, the track is depressed or sunken three or four inches. This is called the 'swag.' When Zink with his load reached the swag and had removed the sprags, as the evidence tends to prove, he called out, 'All right, come ahead,' and moved on. Bowen, who was waiting at the switch, immediately started with his load, and at the swag collided with a car, left there by Zink, and received the injuries from which he died."

WISE & McNULTY, (R. A. HOLLAND, Jr., of counsel,) for appellant.

M. W. BORDERS, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The questions in this case are nearly all questions of fact, and are settled by the judgment of the circuit court, and the judgment of the Appellate Court, affirming the judgment of the circuit court. No instructions upon the trial below were asked by the plaintiff, the present ap-

pellee. Upon the trial, the court gave twenty-one instructions on behalf of the appellant, and at its request. The court refused to give four instructions, numbered from 23 to 26, inclusive, asked by the appellant. No complaint is made of the refusal of the court to give these four instructions. Very little objection is made as to the admission or rejection of evidence by the trial court.

The main error complained of is, that the trial court refused to instruct the jury to find for the defendant. This raises the question whether there was evidence, tending to sustain the cause of action, as set up in the declaration, and if there was such evidence, the court did not err in refusing to instruct the jury to find the defendant not guilty.

The main contention on the part of counsel for appellant is that Bowen, the deceased, and Zink, the mine manager, were fellow-servants at the time Bowen was injured, and that they were both directly engaged in the same line of employment as drivers, and that Bowen was not injured, as the result of any negligent act of Zink done as a vice-principal of the company.

It was the duty of Bowen to haul the empty cars or boxes from the bottom of the shaft of the mine to a certain "parting" or switch in the main entry, and to haul the loaded boxes or cars from the parting or switch to the bottom of the shaft to be hoisted to the surface. Leading from this parting in the direction of the shaft was a very steep decline. In order to haul the loaded boxes down this decline in safety, it was necessary to use "sprags," which were pieces of wood about two feet long placed in the wheels to control the speed of the load. They would be placed in the wheels in this parting, and taken out between fifty and seventy-five feet from the point of the parting at a place designated by the witnesses as a "swag," which was in reality a depression in the track. There was also a sharp curve between this swag and the shaft, and it is admitted that a driver

could easily tell, whether a train of four cars, drawn by a mule, was all following. The evidence tends to show that this entry was very dusty, and that the air, traveling from the bottom of the shaft towards the parting or switch, carried the dust in the face of a driver going towards the shaft. The evidence tends to show that the dusty condition of the entry was well known to the pit boss, Peter Zink, and that he had been repeatedly notified of it by the miners. One witness says that there were "clouds of dust," and another, who was the track layer of the mine, testified that "it was so dusty you could hardly see anything." The evidence also tends to show that, where four of these loaded boxes or cars were drawn by a mule down the decline towards the shaft, the boxes were liable to become uncoupled and to be left in the entry. It appears, however, that where a train of four box-cars is in motion, one of the cars cannot become uncoupled without a jar or jam, so that the driver, if he loses a box, will know of it at the time when it happens.

The injury occurred on April 21, 1902, about four o'clock in the afternoon. At that time Zink, the pit-boss, went to the deceased Bowen at the parting or switch, and complained that the coal was not coming out fast enough. The pit-boss then took a mule, which is said to have been a "spoiled" mule—that is to say, a mule which had been whipped or otherwise maltreated in such a way that it would not haul as large a number of loaded cars as it was able to do—and with this mule, hitched to four boxes or cars, started to haul them from the parting or switch to the bottom where the shaft was. When Zink, the pit-boss, reached the swag, he pulled his sprags, and then directed Bowen to start with his load. The evidence tends to show that the pit-boss called to Bowen, and said: "All right, come ahead." The pit-boss testifies that he gave no such direction to Bowen, but was merely talking to the mule, but his evidence upon this subject is

somewhat indefinite, as he states that he does not know exactly whether he made use of these words, or not. There is other testimony, however, tending to show that they were used, and that they were intended for Bowen.

As has been said, it sometimes happened that one of the cars, drawn by the mule towards the shaft, would become uncoupled, and the evidence is quite clear that, in this case, when Zink went with his load towards the shaft, one of his cars did become uncoupled, and was upon the track in the main entry. Zink admits in his testimony that he lost one of his cars, but did not know where or at what point it became uncoupled. When Zink uttered the words: "All right, come ahead," Bowen started down the hill with his load, driving the mule, which hauled the loaded cars. We discover no evidence in the record, tending to show that he was not in the exercise of due care for his own safety. It appears that his load was carefully "spragged," that is, blocked, so as not to proceed with too great a speed. When near the swag or depression in the track or entry, Bowen came in contact with, and struck, the box or car of coal which Zink, the pit-boss, had left upon the track in the entry. The evidence tends to show that the mule, which was in front of Bowen, turned to the side, and escaped injury, while Bowen was crushed between the forward car of the train, which his mule was hauling, and the box-car, which had been left upon the track by Zink, the pit-boss. His injuries were so serious, that he died in a few days after the accident. The evidence tends to show that, after passing beyond the swag or low point, there is a down-grade for a considerable distance beyond the sharp curve, and the momentum gained in going down the incline was so great, that the impact of the collision caused the car, left on the track by Zink, to move forward and around the curve.

The negligence charged is, that the pit-boss left a loaded coal box in a dark, dusty entry on a down-grade,

and then ordered Bowen, who did not know that such loaded coal box had been left upon the track in the entry, to proceed down the hill with his loaded cars. It is not denied that Zink was the pit-boss, and a vice-principal of the company. Such a boss in a coal mine is the company, so far as employes are concerned. In this case Zink testifies as follows: "I was pit-boss at Richland mine when Bowen was hurt. I lost a car on the trip preceding Bowen in going out. I can't say where I lost that car. \* \* \* I had full supervision of the mine and of the men, and the power to discharge and employ the men, and the power to order and direct Bowen, and I was the pit-boss and acting as such that day, and had charge of Bowen and the other men, and could give them orders."

It is not denied that the position of Zink, as pit-boss, was such as he states it to be in his testimony, and it is conceded by counsel for appellant that, if the negligent act, of which he was guilty, was performed, while he was acting as the vice-principal of the company, the company would be liable.

But the contention of appellant is that, when Zink, the pit-boss, undertook to drive a mule, hauling four loaded cars from the parting or switch to the bottom of the shaft, he abdicated his position of vice-principal, and was engaged as a driver, just as Bowen was engaged, and, therefore, that he and Bowen were fellow-servants. If the negligent act of Zink, which caused the accident, was the act of a fellow-servant of Bowen, then the company would not be liable. The fact, that Zink did not abdicate his position as superintendent, is apparent from the further fact, that he ordered Bowen to come ahead with his load, and thereby still assumed to control the action of Bowen.

In *Chicago and Alton Railroad Co. v. May*, 108 Ill. 288, we said (p. 298): "The mere fact, that one of a number of servants, who are in the habit of working together in the same line of employment for a common master, has

power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to one of the others, without regard to other circumstances. On the other hand, the mere fact that the servant exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances."

The first count of the declaration avers that, "while in the performance of his said work in hauling a load of coal cars from said parting to the bottom of the shaft, and while acting under the orders of said mine manager, and in the exercise of reasonable and ordinary care and caution for his own safety, said Robert Bowen ran against and collided with said loaded coal car, carelessly and negligently left standing in said entry at said place by the said mine manager of defendant, and which said box could not be seen by said Robert Bowen on account of the dust in said entry."

In *Norton Bros. v. Nadebok*, 190 Ill. 595, we said (p. 600): "When the appellee was ordered by his superior servant to put his hand into the machine and take out the 'catch,' in the absence of any warning or notice he had the right to assume that his superior, who gave the order, would not by his own negligence make the act, which he had commanded him to do, and which he was bound to obey, unsafe." So, in the case at bar, when Bowen was ordered by his superior to "come ahead," "in the absence of any warning or notice he had the right to assume that his superior, who gave the order, would not by his own negligence make the act, which he had commanded him to do, and which he was bound to obey, unsafe."

The commands, which a vice-principal, who is a direct representative of the company, gives within the

scope of his authority, are the commands of the company, and, if such commands are not unreasonable, those under his charge are bound to obey at the peril of losing their situations. Hence, the company will be held responsible for the consequences. (*Illinois Steel Co. v. Schymanowski*, 162 Ill. 447.) The mere fact, that Bowen and Zink were working together in hauling coal from the parting to the bottom of the shaft, would not necessarily relieve appellant from liability. In *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, this court, quoting from *Chicago and Alton Railroad Co. v. May*, *supra*, said (p. 554): "The mere fact, that the servant, exercising such authority, sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. \* \* \* When the negligent act complained of arises out of, and is the direct result of, the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case, he is not the fellow-servant of those under his charge with respect to the exercise of such power, for no one but himself in the case supposed, is clothed with authority to command the others."

In *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, we said (p. 588): "If the action was taken by him in the discharge of his duties as vice-principal, his position was one of superiority, and not that of a fellow-laborer. The fact, that, in the discharge of his duties as assistant mine manager, he engaged temporarily in work, usually performed by Nagle, would not justify the declaration, as matter of law, that he became a fellow-servant of the appellee."

In the case at bar, the pit-boss was displeased that the coal was not taken out, or taken up, fast enough, and proceeded himself to take a load of coal down to the shaft quickly and rapidly, and ordered Bowen, whom he preceded, to come along after him as soon as he reached

the "swag." His acts, as well as his words, were a part of his effort to hurry along the work, and increase the amount of coal taken out. He was acting in all respects, not merely as fellow-laborer or fellow-servant, but as a superintendent, directing the conduct of Bowen, so as to make the efforts of the latter speedier and more efficient. We cannot see that there was anything in the facts of the case, which indicated any abdication of his authority by Zink, so as to make him a mere fellow-servant of Bowen.

But, the question whether the relation of fellow-servant exists in a given case is one for the jury, unless the facts, admitted or proved beyond dispute, show the existence of the relation within the definition of fellow-servant, as given by the court, in which case it becomes a question of law. (*Hartley v. Chicago and Alton Railroad Co.* 197 Ill. 440.) In other words, where the facts are conceded, or where there is no dispute whatever as to the facts, and they show beyond question that the relation of fellow-servant exists, then the question may become one of law. But here, the facts are not conceded, but are sharply contested.

The question, whether or not Zink and Bowen were fellow-servants, was submitted to the jury under the instructions of the court, asked by the appellant itself, and that question is finally settled by the judgments of the lower courts. (*Slack v. Harris*, 200 Ill. 96.) In instruction 7, given for the appellant, the court told the jury that "it is necessary for the plaintiff to prove to you that the mine manager at the time the deceased was injured was not a fellow-servant of the deceased."

In the tenth instruction, given for the appellant, the jury were instructed as follows: "And it is not enough to prove that the car was left in the entry by the mine manager, but, before the plaintiff is entitled to recover under this count, he must prove that the car was negligently left by said mine manager; that said mine man-

ager was not, at that time, a fellow-servant within the meaning of the instructions given you, and that the deceased was using due care for his safety to prevent this collision; and, if he has failed to prove all and each of these things, he cannot recover." By this instruction and others, asked by the appellant, the question, whether or not the pit-boss and the deceased were fellow-servants, was left to the jury to be determined by them as a question of fact. They found against the appellant upon this question of fact under the instructions given them, and so far as we are concerned, the question is settled.

We are, therefore, of the opinion that the trial court committed no error in refusing to instruct the jury to find the defendant not guilty, inasmuch as the contention of appellant's counsel, that such instruction should have been given, is based upon the further contention, that the relation of fellow-servants existed between the mine boss and the deceased, as a matter of law. Having been a question of fact, and not a question of law, it was properly submitted to the jury.

Counsel for appellant discuss in their brief certain questions of fact, such as whether there was a collision between Bowen's train and the car left upon the track by the pit-boss, and whether the deceased was guilty of such contributory negligence as should prevent a recovery, and whether or not the entry was dusty, and whether or not there was room at the side of the car at the place where deceased was hurt to have enabled him to escape injury if there was a car upon the track. All these were questions of fact, and were properly submitted to the jury under the instructions, and are settled by the judgments of the lower courts.

We see no reason for reversing the judgment of the Appellate Court, and accordingly that judgment is affirmed.

*Judgment affirmed.*

KATHARINA S. ERNST, **Exrx.**

*v.*

NICHOLAS J. SCHMITZ, **Exr.**

*Opinion filed February 17, 1904.*

1. **APPEALS AND ERRORS**—*effect where all evidence in chancery case is not preserved.* It will be presumed, on appeal in a chancery case, that the evidence was sufficient to sustain the chancellor's findings, where all of the evidence is not preserved in the record and the recitals of fact in the master's report and in the decree justify the decree entered.

2. **SAME**—*abstract of record should be indexed.* Under rule 14 of the Supreme Court the abstract of record must be furnished with a complete index, alphabetically arranged, and it is not sufficient that a meager index of the record itself is printed in the abstract.

**APPEAL** from the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

This is an appeal from the judgment of the Appellate Court for the First District affirming the decree of the circuit court of Cook county rendered upon a bill filed in that court by Mathias Schmitz against Joseph H. Ernst and Andrew J. Ernst, administrator of the estate of Adolph C. Ernst, deceased, for the dissolution of the partnership, which had existed for many years prior to the filing of the bill, between said Mathias Schmitz and Joseph H. and Adolph C. Ernst in the real estate and loan business in the city of Chicago, and for an accounting. Answers and replications were filed, and Joseph H. Ernst filed a cross-bill. The case was referred to a master in chancery to take proofs and report his conclusions as to the law and the facts. Subsequent to the filing of the bill Mathias Schmitz died, and his executor, Nicholas J. Schmitz, was substituted as complainant. Joseph H. Ernst has also died, and his executrix, Katharina S. Ernst, has been substituted as defendant. The firm was

organized in the year 1872. Adolph C. Ernst became a member thereof in 1890 and it continued in active business until 1899. The master reported that Joseph H. Ernst was indebted to Mathias Schmitz in the sum of \$2685.08 and Andrew J. Ernst was indebted to Mathias Schmitz in the sum of \$1556.94, and it was decreed that said sums be paid to Nicholas J. Schmitz, as executor of Mathias Schmitz, deceased, by their respective personal representatives in the due course of administration. Katharina S. Ernst, as executrix, alone prosecuted an appeal.

ERNEST SAUNDERS, for appellant.

ARNOLD TRIPP, for appellee.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

The findings of the master and chancellor are challenged on the ground that they find no support in the evidence. On looking into the record we find that all the evidence upon which the master and chancellor based their findings of fact has not been incorporated into the record, by certificate of evidence or otherwise. The findings of fact contained in the master's report and the decree justified the court in entering the decree which it did, and all the evidence upon which such findings were based not being before this court, it will be presumed the evidence heard below was ample to sustain the findings. *Allen v. Henn*, 197 Ill. 486.

The Appellate Court, when the case was there, filed an opinion, which, in part, is as follows:

"The principal ground of contention is, that the master adopted and the court approved a wrong method of accounting. \* \* \* It appears that both before and after A. C. Ernst joined the firm there were monthly settlements between the partners, and the net profits due to each on account of the business done during the preceding month was then ascertained, whereupon the two

Ernsts usually drew, in cash, what was coming to them, but Schmitz permitted his share of the net profits to remain in the business. The master, after giving credit to the two Ernsts for the amounts which the books showed the firm to be owing to each of them at the time of the dissolution, found that the balance of the assets of the concern should be credited to Schmitz, and stated the account upon that basis. Under the circumstances we think the master was right in so doing. It is also claimed, first, that an account was stated between the partners October 14, 1896, which was improperly disregarded by the master; second, that there were undivided profits for which no credit was given to the defendants; and third, that the cross-bill of J. H. Ernst should not have been dismissed. After a careful consideration of the record and the briefs of counsel we are of opinion that there is no error in either of these regards."

The record in this case contains in the neighborhood of one thousand and the abstract one hundred and forty pages. On the first page of the abstract is printed what purports upon its face to be a meager index of the record. The abstract, however, is not indexed. Rule 14 of this court provides: "The abstract shall contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, with the names of the witnesses and the pages of the direct, cross and re-direct examination." A compliance with this rule requires that the court be furnished with an abstract of the record, properly indexed. To require this court to search back and forth through a pamphlet of one hundred and forty pages to find each paper or exhibit or the testimony of the various witnesses as it becomes necessary to examine the same while the case is being considered or the opinion prepared, is a useless waste of the court's time, and it was held in *Chadwick v. People*, 206 Ill. 122, the court would refuse to consider a case upon its merits when thus presented. In the shape this appeal

comes to us, it might well have been dismissed for a failure to comply with rule 14. We have, however, read the briefs and examined the abstract and record and have found no reversible error therein. The opinion of the Appellate Court, in our judgment, properly disposed of the case.

The judgment of the Appellate Court will therefore be affirmed.

*Judgment affirmed.*

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THE CHICAGO UNION TRACTION COMPANY

v.

THE CITY OF CHICAGO.

*Opinion filed February 17, 1904.*

This case is controlled by the decision in *Chicago Union Traction Co. v. City of Chicago*, 204 Ill. 363.

APPEAL from the County Court of Cook county; the Hon. L. C. RUTH, Judge, presiding.

WILLISTON FISH, and LOUIS BOISOT, (JOHN A. ROSE, of counsel,) for appellant.

ROBERT REDFIELD, (CHARLES M. WALKER, Corporation Counsel, and EDGAR B. TOLMAN, of counsel,) for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This is an appeal from the county court of Cook county confirming a special assessment for curbing, guttering, grading and paving North Park avenue from the north curb line of Sigel street to the south curb line of Menominee street. The estimated cost of the proposed improvement is \$3300. Sub-lots 1, 2 and 3 in subdivision of lots 33, 36 and 27, and that part north of Eugenie street of lot 34, in North's addition, and the east 125 feet of sub-lot 4 and the west 267 feet of sub-lot 4, both

in lot 38, in North's subdivision, were specially assessed to appellant. All this property is located in a single block lying east of and abutting on North Park avenue, and between Tell court on the north and Eugenie street on the south. Through this block, north and south, runs a small street called Hammond street, beginning in Eugenie street and terminating at Tell court. Lots 1, 2 and 3 and the east 125 feet of sub-lot 4 lie east of Hammond street and abut on North Park avenue, and are used by appellant as a yard for the storage of paving blocks, gravel and other track material except rails, and are called "east yard on Hammond street." The west 267 feet of sub-lot 4 lies west of Hammond street and is used for like purposes of storage, and is called "west yard on Hammond street." There are no street railroad tracks on either of these yards or leading to them, and they are not used for railroad purposes, except in that they are used for the storage of material with which the railroad company paves its tracks. Lot 1 is assessed at \$157.75 and lots 2 and 3 at \$125.05 each, and sub-lot 4 was assessed at \$261.85.

Numerous objections were filed by appellant, but the single objection (No. 22) that "the said assessment upon the property of said objector exceeds the benefits which will accrue to said property from the proposed improvement," is insisted upon. The trial was by the court, a jury being waived.

It is stipulated between the parties that the fee to this property belongs to the North Chicago City Railway Company, and was in 1886 leased for 999 years to the North Chicago Street Railroad Company, and by the latter company, in 1899, leased to the appellant for the unexpired period of the North Chicago Street Railroad Company's lease. All the above companies are corporations organized under the laws of this State.

Appellee made the formal proofs, including the offer of the assessment roll, and rested. Appellant placed

upon the stand one Charles Caul, who testified that for the last fifteen years there has been, and is now, a tight-board fence between North Park avenue and the property in question, without any gate or entrance from Park avenue to such property, and that all the materials stored upon the property came in through Hammond street, and further testified that for the uses to which the company put the property, the pavement on Park avenue would be of no benefit to the same, and it was agreed that one J. J. Murphy, a witness for objector, would testify to the same effect. Appellant also offered to prove that there is no intention on the part of the company to alter the use of the property above objected for, from its present use. This evidence was excluded by the court and objection made and exception taken. H. Goldstein, a witness on behalf of the appellee, testified that the property would be benefited to the full extent of the assessment, taking into consideration the uses to which it was put.

This was all the evidence, and appellant then offered nine propositions of law, which it requested the court to hold. The court held the eighth and refused all the others. The eighth holding was to the effect that the burden of proof rested upon appellee to show that the property objected for would be benefited to the extent of the assessment, and that as to any lot concerning which the objector had offered competent and material evidence that it would not be benefited to the amount assessed against it on the assessment roll, the assessment roll itself could not be considered as the testimony of any witness on the question of benefits. The eight refused holdings, as offered by the appellant, were all upon the theory that the property in question is street railroad property and is held by said company for street railroad uses and purposes only, and that said company cannot lawfully apply said property to any other uses or purposes than such as are necessary or proper for the oper-

ation and maintenance of its street railways, and that the only basis upon which benefits can be assessed to it upon said property is that of the uses to which appellant puts the same.

The briefs and arguments in this case, in all essential features, are the same as were those in the case of *Chicago Union Traction Co. v. City of Chicago*, 204 Ill. 363, each taking the same position as to the basis for the assessment and each relying upon the same authority in support of the contention. The holdings, too, offered in the latter case were practically the same as those here offered, so that the main question here presented has already received the full consideration of this court and has been decided adversely to the contention of appellant, and as upon that phase of the case the case last cited is exhaustive and controlling, we deem it unnecessary to further discuss and consider the main question here presented, but are satisfied to adhere to the views expressed in the former case.

The evidence offered by appellant as to the extent of benefits was upon an erroneous theory of the rule governing such benefits, and did not, as we think, overcome, or even tend to contradict, the *prima facie* case made by the assessment roll, which, together with the oral testimony offered on behalf of appellee, we regard as amply sufficient to show that the property was benefited to the extent of the assessment. Nor was there error in refusing to permit appellant to show that it was its intention to continue the same use of the property in question as that to which it had theretofore been put by it. That testimony was both incompetent and irrelevant, and could not in any manner affect the case.

There was no error in the action of the county court of Cook county, and its judgment is affirmed.

*Judgment affirmed.*

C. P. BIGGERSTAFF *et al.*

*v.*

ANNA B. VANPELT *et al.*

*Opinion filed February 17, 1904.*

1. **WILLS**—*a reversion is subject to devise.* Both at common law and under our Statute of Wills a reversion is recognized as an estate in law which may pass by devise.

2. **SAME**—*presumption is that testator intended to dispose of his entire estate.* It is presumed a testator intended to dispose of his entire estate by his will, and not to leave any part as intestate property.

3. **SAME**—*when devise of residue applies to all of testator's remaining estate.* A devise of "all the rest, residue and remainder of my estate, both real and personal," to the testator's children, after a devise of particular property to the testator's wife for life, which was the only property previously disposed of, applies to all of the remaining portion of the testator's estate.

4. **SAME**—*testator's intention is not to be determined by single clause of will.* Neither the legal effect of a will nor the intention of the testator is to be determined alone from a single clause of the will, but the same must be determined from the entire will.

5. **SAME**—*word "remainder" need not be given its strict legal meaning.* The word "remainder," which in its technical sense is a remnant of an estate in lands which is expectant upon and a part of the estate created therewith at the same time, may be construed as applying to any kind of a subsequent interest or limitation thereof, and may be given the meaning of "reversion."

6. **SAME**—*when children take life estate.* Where a will devises a life estate in particular property to the widow in accordance with a prior contract, and provides that the "rest, residue and remainder" shall go to his children, but by a subsequent provision the shares of his daughters in such remainder are limited to a life estate with remainder to their lawful children, the daughters take a life estate in the testator's reversionary interest in such property with remainder in fee to their children.

**APPEAL** from the Circuit Court of Knox county; the Hon. G. W. THOMPSON, Judge, presiding.

P. H. SANFORD, for appellants:

In construing the will in question the legal meaning of the words "fee" and "remainder," as used therein, should be given them. *Lehndorf v. Cope*, 122 Ill. 323.

A fee is the largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and his heirs absolutely, without any end or limitation being put to the estate. Tiedeman on Real Estate, sec. 36; Bouvier's Law Dic. 776; 4 Kent's Com. (13th ed.) p. 5.

A remainder is a remnant of an estate in land depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it. 4 Kent's Com. 198; Bouvier's Law Dic. 869; 2 Washburn on Real Prop. 585, and cases in note; Tiedeman on Real Estate, sec. 396.

The remainder, and the particular estate upon which it depends, must together constitute the entire estate, *i. e.*, be equivalent to a fee simple estate in the premises. 2 Washburn on Real Estate, 585, 586.

If the future estate does not take effect in possession immediately upon the expiration of the prior particular estate it is not a remainder. Tiedeman on Real Estate, sec. 396.

The rule which controls all others in the interpretation of wills is, that the intention of the testator, to be gathered from the entire will, must govern. *Boyd v. Strahan*, 36 Ill. 355; *Akers v. Clark*, 184 id. 136.

WILLIAMS, LAWRENCE & WELSH, for appellees:

Two contracts or writings executed at the same time, referring to the same subject matter and where the same parties are interested, should be construed together. *James v. Hanks*, 202 Ill. 114.

A life estate can be limited upon or made subject to any number of life estates where the parties are *in esse*, and it is not necessary that this should be done in the same instrument or writing. 2 Powell on Devises, 110, 120; *Glover v. Spurlock*, 4 Browne's Ch. 339; *Madison v. Larmon*, 170 Ill. 65.

Mr. JUSTICE RICKS delivered the opinion of the court:

Appellees filed their bill for partition in the Knox circuit court, making appellants and others parties defendant, for the partition of certain blocks and parts of blocks in the village of Wataga, in said Knox county. The property described in the bill, designated as the Holyoke property, was the homestead of one Booker Pickerel, who was the grandfather of appellees. Booker Pickerel's wife was Amelia, and on the 30th day of June, 1884, he and his wife entered into an agreement under seal and acknowledged, by which a life estate to her in the real estate in question, together with certain personal property and a certain annuity, was, and was to be, accepted by Amelia Pickerel in full of her dower, homestead, widow's award, and all claims of every character against the estate of Booker Pickerel. Booker Pickerel had a large estate, consisting principally of land, and had five children,—two sons and three daughters. On the same day that the contract was executed between himself and wife he made his will, which, after his death, was duly probated and about which there is no controversy. The second, third and fifth clauses of his will comprise all the parts of the will that in any manner make any disposition of his property. The first clause merely directs the payment of his debts and the fourth appoints the executor. The will contains but five clauses. The clauses referred to are as follows:

*"Second*—Having agreed with my beloved wife, Amelia Pickerel, as to the portion of my estate which she shall take, I do hereby direct my executor hereinafter named, to pay her the sum of \$600 per year, to be paid her in equal installments, half-annually, as provided in a certain contract made with her on June 30, 1884; which sum of \$600 per annum I hereby direct shall be a charge and lien upon all real estate remaining after payment of debts, so long as she shall live; which provision and other provisions made in said contract, and which I wish

my executor to fully carry out, shall be taken and has been accepted by her in full of and as a substitute for her dower and distributive share in my estate.

*"Third*—All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath to my children, John U. Pickerel, Richard H. Pickerel, Mary Freet, Susan Lawrence and Dana Wright, share and share alike.

*"Fifth*—It is my will that my three daughters above named shall not take their share of the real estate in fee, but as to them my bequest is to them of such undivided share of such remainder for life only, remainder to their lawful children."

The testator died August 1, 1884, and Amelia, his wife, survived him and took the real estate in controversy for her life, under the contract herein above mentioned. Amelia Pickerel died April 12, 1899. Prior to her death the two sons and the three daughters of the testator all joined in a conveyance conveying, by quitclaim deed, to the said Amelia Pickerel all their interest in the said Holyoke property, the property in controversy, and appellants, by *mesne* conveyances from Amelia Pickerel, claim as purchasers and owners in fee of said Holyoke property. Mary Freet, one of the daughters, died November 23, 1898, leaving appellee Anna B. VanPelt her only child and heir-at-law. Appellees Maud Steel and Ray Wright are adult children of Mandane Wright, one of testator's daughters, and appellees Daisy Lawrence and Madge Lawrence are the adult children of Susan Lawrence, the third of testator's daughters.

Under a bill alleging the above facts, appellees claim the right to partition the Holyoke property, as owners of three-fifths of the interest of their grandfather, Booker Pickerel, therein, by virtue of the provisions of his will.

Appellants answered the bill, admitting the facts as alleged therein, but denying that by the will appellees took any interest in said real estate. General replica-

tion was filed to the answer and the cause referred to the master. The testimony of but one witness was taken, —George A. Lawrence, a lawyer of Galesburg,—who testified that he prepared the contract between Booker Pickerel and his wife, Amelia, and the will of Booker Pickerel, on June 30, 1884. The contract was prepared, executed and delivered before the will. This, together with the documentary evidence, was all the evidence heard by the master, who found and reported: "It is evident that the fifth clause was inserted as a modification of the third clause. By the third clause, standing alone, the five children would take this Wataga property subject to the life estate of Mrs. Pickerel therein. They did not take the property in fee. By the third clause not modified the five children would have taken the balance of his real estate alike in fee, but by the fifth clause he says, 'It is my will that my daughters above named shall not take their share of the real estate in fee,'—that is, in so far as my daughters would take real estate in fee under the third clause, I direct that they shall take only a life estate in such real estate, remainder to their lawful children. The legal definition of a fee is: 'The largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and his heirs absolutely, without any end or limitation put to the estate.' By the third clause Pickerel gave these premises to the five children subject to the life estate of the widow. Did he give it to them in fee? We think not. He did not have it to give, as he had already given a life estate, and could only give them the premises subject to the life estate, as he had only that to give,—a reversionary interest in the premises. Complainants claim only as remainder-men. By the will no remainder was created as to these premises. A remainder is defined to be 'the remnant of an estate in land depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on

determination of that estate and not independent of it.' In construing this will we think the legal import and meaning of the words *fee* and *remainder* should be given to them. The remainder, and the particular estates upon which it depends, must together constitute the entire estate,—that is, be equivalent to a fee simple estate in the premises. As to these premises this could not be under this will, as the testator had by another instrument and at a different time created a life estate in the premises to his wife."

The master, after expressing these views, held that as to the property in question the two sons and three daughters took alike, and that appellees had no interest in the property and that their bill should be dismissed for want of equity. Objections were filed to the report of the master and by him overruled, and exceptions filed before the chancellor and by him sustained, except as to point 5, which was to the holding of the master that technical definitions should be applied to words used in the will, and that in construing it the technical meaning, rather than the plain meaning and intent of the testator, should be given effect. The chancellor granted the relief as prayed and appellants prosecute this appeal, and urge that the court erred in sustaining complainants' exceptions to the finding of the master and in granting the relief.

The whole argument of appellants is predicated upon the contention that as the testator had, by the contract between himself and his wife, carved out a life estate from the property in question before the making of the will, therefore he had but the reversionary interest, which alone could pass by his devise, and that such interest was less than a fee, and that, inasmuch as the fifth clause, which attempted to modify the grant to the devisees in the third clause by the use of the following language in the fifth clause, "it is my will that my three daughters, above named, shall not take their share of the real es-

tate in fee," referred only to such portion of the estate as could by the devise under the third clause have passed in fee to the daughters, and that as the property in question could not pass in fee to the daughters under that devise, therefore it was not affected by the fifth clause, and that the whole reversionary interest, whatever it was, being less than a fee, passed and vested absolutely in the sons and daughters. Appellants further contend, that as by the express terms of the fifth clause the appellees take a *remainder*, and as there was other real estate than that in question which passed by the third clause of the will to the mothers of appellees, and in which appellees, by the fifth clause, did take a remainder, the word "remainder" should be given its strict legal definition and effect, and not be held to mean or include a reversion, and that by so doing the property in question would not pass.

This position is grounded upon the technical definition of the words "fee" and "remainder," it being said that a fee "is the largest possible estate which a man can have, being an absolute estate," and that a remainder is "the remnant of an estate in land depending upon a particular prior estate created at the same time and by the *same instrument*, and limited to arise immediately on determination of that estate, and not in abridgment of it," citing 2 Bouvier's Law Dic. 869; 2 Washburn on Real Prop. 585; 4 Kent's Com. 198; Tiedeman on Real Prop. sec. 396. In support of their position appellants invoke the rule of construction applicable to wills, that each word and term used must be given effect according to its legal import.

If a reversion could not be the subject of a devise the position of appellants would be unassailable. Both at the common law and by the first section of our statute relating to wills a reversion is recognized as an estate or interest in land that may pass by devise. When a will is established, the presumption is that the testator in-

tended to dispose of his entire estate, and not to leave any part of it as intestate property. By the second clause of the will in question the testator declares that he has made an agreement with his wife, Amelia, as to the portion of his estate she shall take, and directs that she be paid \$600 annually, in equal semi-annual payments, and makes such annuity a charge on his real estate. By the agreement referred to in the will he gives her the Hol-yoke property for life and also the household goods, and agrees further that his executors and administrators will assume and pay to his wife an annuity of \$600 in half-yearly payments so long as she shall live. By the third clause of the will the testator grants to his five children, two sons and three daughters, naming them, "all the rest, residue and remainder of my estate, both real and personal, \* \* \* share and share alike." As no part of his estate had otherwise been disposed of, except by the agreement with his wife and the second clause of his will, which disposition was made solely with reference to the portion that should be taken by his wife, it is entirely apparent that by the third clause the testator intended to give to his five children named, all the remaining portion of his estate.

But it is said, that as the third clause only disposed of the estate in the same manner that the law of descent would have done without the will, therefore that clause is void, and in support of this contention is cited *Akers v. Clark*, 184 Ill. 136, where it is said (p. 137): "A devise giving precisely the same estate and interest in property as the devisee would take by descent if the devise had not been made is void, for the reason that a title by descent is regarded as a worthier or better title than by devise or purchase." This rule would be applicable and controlling were it not for the fifth clause of the will. Neither the legal effect nor the intention of the testator is alone determined by a single clause of the will, and both must be determined from the entire will, giving

each clause and each word thereof, if the same can be done, validity. When the fifth clause is read in connection with the third clause and effect given to it, it appears that by the devise in question the testator did not give to his three daughters the same estate in any of his real estate that they would have taken in case of intestacy, but that the estate to each of them was limited to that of a life estate; and whilst it is true that the word "remainder," in a strict legal sense, as spoken of in the books when referring to estates, has a somewhat restricted meaning, it is also true that it has a broader meaning as commonly and generally understood. As applied to estates, and under the restricted meaning, the definition of the word "remainder" is, "a remnant of an estate in lands and tenements expectant upon and part of the estate created together with the same at one time;" and it would seem the greater weight of authority is, that to be strictly a remainder it must be created not only at the same time, but by the same instrument as the particular estate.

"The term 'remainder' is sometimes used in a lax sense to define any kind of subsequent interest, or the limitation thereof. But a limitation of a remainder, strictly so called, is a clause creating or transferring an estate or interest in lands or tenements which is limited, either directly or indirectly, to take effect in possession or in enjoyment, or in both, subject only to any term of years or contingent interest that may intervene immediately after the regular expiration of a particular estate or freehold previously created together with it by the same instrument out of the same subject of property." (Smith on Executory Interests, sec. 159.) "An estate, then, in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined." (2 Blackstone's Com. 164.)

In the case before us the estate granted to the wife was one for life, and the estate remaining in the testa-

tor and susceptible of his disposition was just as great and just as certain as though the testator had, by the will, granted to his wife a life estate and to each of his daughters a life estate in remainder, with remainder in fee to his grandchildren, the children of his respective daughters. The words "revert," "reversion" and "remainder" are sometimes interchangeably used, as was the case in *Dalrymple v. Leach*, 192 Ill. 51, where the testator gave to his wife two-thirds of his property, and by subsequent clause provided, "if at my wife's death there is any property then in her possession or control, I desire one-half the same shall revert to my nephew, Frederick Dalrymple." (See, also, 24 Am. & Eng. Ency. of Law—2d ed.—420.) And in the case of *Akers v. Clark*, *supra*, which was a devise of a reversion in land, Mr. Justice PHILLIPS, in speaking of the devise, said (p. 138): "The *remainder*, after the expiration of her life estate, under the law as well as under the deed, reverted to the grantor or his heirs. He being a reversioner first in order of time, might dispose of the fee absolutely by will or by deed." As in the case at bar an estate of the same extent would have passed by the devise whether it had been termed a "reversion" or a "remainder," and as we think there can be no doubt as to the intention of the testator, taking the provisions and language of the will as a whole, and that his intention was that the appellees should ultimately have the fee of the reversionary interest in the Holyoke property, we would not feel warranted in giving the word "remainder" the restricted meaning contended for, and thus defeat the plain provision of the will.

We think the conclusion of the chancellor was the correct one, and the decree of the circuit court is affirmed.

*Decree affirmed.*

AMALIE TORSSELL

v.

JACOB A. EIFFERT.

*Opinion filed February 17, 1904.*

1. **APPEALS AND ERRORS**—*when amount in controversy does not govern right of appeal.* The amount in controversy does not govern the right to appeal to the Supreme Court where the action is not to recover money, property or damages, but to enjoin the collection of a judgment alleged to have been wrongfully obtained.

2. **SAME**—*general recitals in decree do not supply place of certificate of evidence.* Recitals in a decree that the court has jurisdiction and that all the material allegations of the bill are true are not sufficient to supply the place of a certificate of evidence.

3. **SAME**—*when complainant must preserve the evidence.* In order to sustain a decree granting the prayer of the bill, it is the duty of the complainant, and not of the defendant, to preserve the evidence, either by a certificate of evidence or by specific findings of fact in the decree.

*Torsell v. Eiffert*, 108 Ill. App. 67, reversed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

JAMES H. HOOPER, for plaintiff in error.

BULKLEY, GRAY & MORE, for defendant in error.

Mr. CHIEF JUSTICE HAND delivered the opinion of the court:

This is a bill in chancery filed in the circuit court of Cook county by defendant in error to enjoin the collection of a judgment rendered in the county court of Cook county against him, in favor of plaintiff in error, for \$129 and costs. The bill alleges that the plaintiff in error recovered a judgment against the defendant in error by fraud, before one of the justices of the peace of Cook county; that the plaintiff in error took an appeal to the county court of said county, where a judgment in trover

was entered for the above amount, and that the sheriff of Cook county, by virtue of a *ca. sa.* issued from said court, is about to arrest the defendant in error and confine him in the jail of Cook county in accordance with the command of said writ, and prays that the plaintiff in error and the sheriff, and those claiming under or through them, may be enjoined from enforcing the collection of said judgment, and that the same may be set aside. The case was tried in open court and a decree entered in accordance with the prayer of the bill of complaint. The case was taken by writ of error to the Appellate Court for the First District by plaintiff in error, where the decree of the circuit court was affirmed, and the record has been brought to this court for a further review.

A motion was made by defendant in error to dismiss the writ for want of jurisdiction in this court to hear and determine the same on the ground that the amount involved in the controversy was less than \$1000, and that the Appellate Court had granted no certificate of importance, which motion was reserved. The purpose of this action is not to recover money or property, but to enjoin the collection of a judgment claimed to have been wrongfully obtained. In the case of *Richards v. People*, 100 Ill. 423, which was a bill to enjoin the obstruction of a road, where it was insisted this court was without jurisdiction to entertain an appeal from the Appellate Court, it was said (p. 425): "The statute making the right of appeal from the Appellate to this court depend, in certain classes of cases, upon the amount in controversy or of recovery in the court below, has no application where the object of the suit is not to recover a debt or damages, or some specific article of property, either personal or real. In all other cases, by the express provisions of the eighth section of the Appellate Court act, an appeal lies to this court." And in *Chalcraft v. Louisville, Evansville and St. Louis Railroad Co.* 113 Ill. 86, which was a bill

to enjoin the construction of a bridge for a farm crossing over a railroad track, in passing on a motion to dismiss for want of jurisdiction to entertain the writ of error, the court said (p. 87): "This is not a suit to recover money or chattels, and is not, therefore, affected by the statute limiting appeals and writs of error to \$1000, and the writ hence lies, without regard to the magnitude of the interests involved." And in *Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, a proceeding to enjoin the levy upon a sale of a lot under execution and to remove a cloud upon the title arising by the apparent lien of the judgment, a motion to dismiss was made for the same reason as here suggested. It was held (p. 371) that "the purpose of the suit is not the recovery of money or property, but it is to enjoin the levy upon and sale of the lot under execution and to remove the cloud from the title, and in such case the right to an appeal is not determined by the amount of the judgment." The motion to dismiss the appeal is denied.

It is insisted by the plaintiff in error that this case must be reversed for the reason that no certificate of evidence is contained in the record and no findings of fact were incorporated in the decree. The decree finds "that the court has jurisdiction of the parties and of the subject matter in this cause; that all the material allegations of the said bill are true," and nothing further. Such finding is but a conclusion, and is not sufficient, under the decisions of this court, to supply the place of a certificate of evidence. The case having been tried in open court upon oral testimony, it was the duty of the complainant—not of the defendant—to preserve the evidence either by certificate of evidence or specific findings of fact in the decree. In the case of *Village of Harlem v. Suburban Railroad Co.* 202 Ill. 301, where the finding of facts was the same as in this decree, the cause was reversed. It was there said (p. 302): "In chancery cases the practice is well settled in this State that the party

in whose favor a decree granting relief is entered, to maintain it must preserve the evidence by a certificate of evidence or otherwise, or the decree must find the specific facts that were proven on the hearing, and that it is not the duty of the party against whom the decree granting relief is rendered to preserve the evidence." Having failed properly to preserve the evidence upon which the decree in this case is based, under the foregoing decision and cases therein cited the decree must be reversed.

The judgment of the Appellate Court and decree of the circuit court will be reversed and the cause remanded to the circuit court of Cook county.

*Reversed and remanded.*

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THE KELLYVILLE COAL COMPANY

v.

A. J. HARRIER.

*Opinion filed February 17, 1904.*

1. CONSTITUTIONAL LAW—*privilege of contracting is both a liberty and a property right.* Employer and employee may agree that the labor of the latter may be paid for with the property of the former, or the laborer may agree to work in payment of a pre-existing debt, and in either case the rights of the parties are free from interference by the legislature.

2. SAME—*legislature cannot prohibit parties from making lawful contracts.* The legislature has no power to provide that one possessed of property may not sell it to another and agree with the purchaser that the latter shall work in payment.

3. SAME—*when law is void for unjust discrimination.* The exclusion of farmers from the operation of an act prohibiting employers from setting off debts of employees against claims for wages creates an unjust discrimination, which invalidates the act.

4. SAME—*act of 1891, concerning wages of miners, is unconstitutional.* The act of 1891, (Laws of 1891, p. 212,) prohibiting persons or corporations engaged in mining or manufacture from setting off debts of employees, for goods purchased from the employer, against claims for wages by such employees, is unconstitutional.

APPEAL from the Circuit Court of Vermilion county; the Hon. M. W. THOMPSON, Judge, presiding.

H. M. STEELY, for appellant:

The discrimination in section 6 of the act of 1891, (Laws of 1891, p. 212,) in favor of farmers, farm laborers and servants, goes to the whole act, and is in contravention of the fourteenth amendment to the Federal constitution, in that it denies to appellant the equal protection of the laws. *Connelly v. Sewer Pipe Co.* 184 U. S. 540; *Yick Wo v. Hopkins*, 118 id. 356; *Duncan v. Missouri*, 152 id. 377; *Smyth v. Ames*, 169 id. 522; *Gibbons v. Ogden*, 9 Wheat. 1210; *Sinnot v. Davenport*, 22 How. 227; *Railroad Co. v. Haber*, 169 U. S. 613; *Missouri v. Lewis*, 101 id. 22; *Ruhrstrat v. People*, 185 Ill. 133; *Busch & Co. v. Webb*, 122 Fed. Rep. 655; *Cotting v. Stock Yards Co.* 183 U. S. 79.

A statute which deprives coal miners, and those employing them, of the right to conduct their dealings in any manner mutually satisfactory is unconstitutional. *Harding v. People*, 160 Ill. 459.

A statute which forbids to any citizen the right to contract or deprives him of the power to contract deprives him of liberty and property without due process of law, and is in violation of that portion of the Bill of Rights in our constitution known as section 2 of article 2. *Frorer v. People*, 141 Ill. 171; *Harding v. People*, 160 id. 459; *Bailey v. People*, 190 id. 28; *Braceville Coal Co. v. People*, 147 id. 66; *Millett v. People*, 117 id. 294; *Ramsey v. People*, 142 id. 380; *Ritchie v. People*, 155 id. 98.

The legislature has no right to discriminate between different lines of business or employers of labor. If it does, it is special or class legislation. *Harding v. People*, 160 Ill. 459; *Ramsey v. People*, 142 id. 380; *Ritchie v. People*, 155 id. 98.

A statute that deprives a person or corporation of the right to contract, deprives it of liberty and property without due process of law. *People v. Jacobs*, 98 N. Y. 98;

*Millett v. People*, 117 Ill. 294; *Harding v. People*, 160 id. 459; *Ritchie v. People*, 155 id. 98.

The constitutionality of a statute is a judicial question, to be determined by reference to the subject matter of the legislation and its results. *Lake View v. Cemetery Co.* 70 Ill. 191; *Mugler v. Kansas*, 123 U. S. 623; *Minnesota v. Barber*, 136 id. 313.

W. T. GUNN, for appellee:

It is a settled rule that statutes that are constitutional in part, only, will be upheld so far as they are not in conflict with the constitution, provided the allowed and prohibited parts are separable. *Presser v. Illinois*, 116 U. S. 583; *Packet Co. v. Keokuk*, 95 id. 80; *Penniman's case*, 103 id. 714; *Unity v. Burrage*, id. 459; *People v. Kenney*, 96 N. Y. 302; *Trade-Mark cases*, 100 U. S. 82.

The presumption is always in favor of the constitutionality of a statute. *Bunn v. People*, 45 Ill. 397; *McVeagh v. Chicago*, 48 id. 318.

A statute should not be construed unconstitutional if any other reasonable construction is possible. *People v. Peacock*, 98 Ill. 172; *Middleport v. Insurance Co.* 82 id. 562.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee brought this suit before a justice of the peace of Vermilion county, against appellant, to recover for wages due him as a miner. On appeal to the circuit court a jury was waived and the cause was submitted to the court for trial. There were no disputed facts. Defendant owed plaintiff for wages and plaintiff was indebted to defendant for groceries and household supplies purchased by him. The only controversy was as to the right of defendant to set off the amount due from plaintiff against his demand for wages, defendant claiming that right and admitting that it owed plaintiff the balance. Plaintiff claimed the right to recover the whole

amount of wages earned, and disputed the right to set off against the same the amount due from him to defendant.

Plaintiff's claim was based on sections 3 and 4 of an act entitled "An act to provide for the payment of wages in lawful money, and to prohibit the truck system, and to prevent deductions from wages except for lawful money actually advanced," in force July 1, 1891. (Laws of 1891, p. 212.) The first and second sections of said act were declared in the case of *Frorer v. People*, 141 Ill. 171, to be repugnant to the constitution of the State, and void. Those sections prohibit an employer engaged in mining or manufacturing from keeping or being interested in a store for furnishing supplies, tools, clothing, provisions or groceries to his employees, and declare every person, company, corporation or association violating that prohibition to be guilty of a misdemeanor and liable to a fine. Sections 3 and 4 are as follows:

"Sec. 3. It shall be unlawful for any person, company, corporation or association, employing workmen in this State, to make deductions from the wages of his, its or their workmen, except for lawful money, checks or drafts actually advanced without discount, and except such sums as may be agreed upon between employer and employee, which may be deducted for hospital or relief fund for sick or injured employees.

"Sec. 4. Any deductions made from the wages of any workman in this State, except as provided in section three (3) of this act, may be recovered in any appropriate action before any court of competent jurisdiction, together with such reasonable attorney's fee as the court in its discretion shall think proper, and no offset or counter-claim of any kind shall be allowed in such action or proceeding."

On the trial of this case defendant submitted to the court a number of propositions of law asking the court to hold that defendant, under the law and its charter, has a legal right to keep a store and furnish and sell to

its employees supplies, tools, clothing, provisions, groceries, and such other articles as its employees see fit to purchase from it, and that so far as the act in question attempts to deprive defendant of the right to set off against the demand of plaintiff for wages any demand owing by plaintiff to defendant for groceries, merchandise or other articles purchased at its stores, when it allows such right of set-off to farmers as against their employees, is repugnant to the constitution of the United States and the constitution of the State of Illinois. The court held the first proposition to be the law, to the effect that the defendant had the right to keep the store and sell such goods to its employees as they choose to purchase, but refused to hold that the third and fourth sections were in violation of the constitution, or that the act was rendered unconstitutional by the provision that nothing contained in it should be construed to include the business of farmers or farm laborers or servants. The court held that an employer may sell goods to an employee, but if he is a miner or manufacturer he cannot lawfully secure payment by way of set-off. Accordingly the court found the issues for the plaintiff and entered judgment in his favor for the whole amount of his demand, which was \$21.27, and costs of suit, together with \$20 attorney's fees, as provided by said section 4.

It is, of course, conceded that sections 1 and 2 of the act are in violation of the constitution, but it is insisted that sections 3 and 4 should be upheld. We do not see how that can be done, and must hold that the whole act is void. Section 6 of the act is as follows: "Nothing in this act shall be so construed as to include the business of farmers, or farm laborers, or servants." A large proportion of the employers of labor in the State are farmers, and the valuable right of set-off is allowed to them while it is denied to the miner or manufacturer. A farmer whose employee is indebted to him, if sued by the employee, may set off the amount of such indebtedness

against the demand of the employee for wages, and the recovery can only be for the balance due. The employee of a miner or manufacturer is not limited to the recovery of the balance due him, but may have a judgment for the whole amount of his wages, and the employer is relegated to a separate action at law to collect what is justly due him, if he can. By this discrimination the miner and manufacturer are deprived of the equal protection of the laws guaranteed to them by the Federal constitution. It is too plain for argument that the exemption of farmers, farm laborers and servants was a material consideration with the legislature in the passage of the act, and that it would not have been enacted if they had not been excluded in its operation and protected from its provisions. The whole act is therefore void. *Connelly v. United States Sewer Pipe Co.* 184 U. S. 540; *Mathews v. People*, 202 Ill. 389.

Furthermore, it is not within the power of the legislature to provide that one who is possessed of property may not sell it to another and agree with the purchaser to work for him in payment for it. The privilege of contracting is both a liberty and a property right. (*Froerer v. People, supra.*) The laborer has a right to contract with respect to his labor and to make such terms and agreements as may be mutually agreeable to him and his employer. They may agree that the labor of one shall be paid for with the property of the other, or the laborer may agree to work in payment of a pre-existing debt, and in either case the rights of the parties are free from interference by the legislature. *Harding v. People*, 160 Ill. 459.

The judgment of the circuit court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

F. O. HARRISON

v.

THE NATIONAL BANK OF MONMOUTH.

*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*when certificate of importance presents no question for consideration.* A certificate of importance from the Appellate Court presents no question for the consideration of the Supreme Court in a suit at law, unless the record shows questions of law to be passed upon.

2. SAME—*question of defendant's residence is one of fact.* Whether one defendant was a resident of the county where the suit was brought, so as to give jurisdiction, under section 2 of the Practice act, of a defendant in another county, is a question of fact.

3. SAME—*question of law cannot be considered unless preserved for review.* Whether the liability of the defendants in an action on a promissory note is joint, so as to give jurisdiction of the person of one of them who is not a resident of the county where the suit is brought, is a question of law, and, where the trial is had without a jury, should be preserved for review by submitting a proposition of law to be held or refused.

*Harrison v. National Bank of Monmouth*, 108 Ill. App. 493, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Warren county; the Hon. JOHN A. GRAY, Judge, presiding.

C. H. LAYMAN, for appellant.

J. B. BROWN, and L. L. LEGG, for appellee.

Mr. JUSTICE RICKS delivered the opinion of the court:

This was an action of assumpsit, brought to the September term, 1901, of the Warren county circuit court by the National Bank of Monmouth, against F. O. Harrison, Allen Jones and O. T. Kimmel, Harrison and Jones being the makers of the promissory note sued on and Kimmel being endorser thereon. Summons was issued directed to the sheriff of Franklin county for Harrison and Jones and to the sheriff of Warren county for Kimmel. The

summons issued to Franklin county was returned to the clerk of the Warren county circuit court, with the endorsement of the sheriff showing service as to appellant, Harrison, and not served as to Jones, and the summons to Warren county was returned showing defendant not found. Appellant, Harrison, filed his plea in abatement to the jurisdiction of the court, to which replication was filed. Kimmel appeared and filed the general issue, and upon the day of trial Kimmel withdrew his plea of general issue and entered his appearance and allowed a default to be taken as to him. A jury was waived and both matters of law and fact were submitted to the court, and after the introduction of evidence as to the place of residence of Kimmel, the court found the issues for the plaintiff and entered judgment against appellant upon his plea in abatement in the sum of \$288.71, and judgment by default against Kimmel for the same amount. An appeal was prosecuted to the Appellate Court by appellant, Harrison, where the judgment of the circuit court was affirmed, and the case is brought to this court upon a certificate of importance.

The cause was tried before the court without a jury and no propositions of law were submitted, and there are therefore no questions of law before this court for review. The certificate of the Appellate Court certifying a cause to this court does not present any question for the consideration of this court unless the record shows questions of law to be passed upon. *Commercial Nat. Bank v. Cauniff*, 151 Ill. 329.

Two questions are presented by the record. The first is as to whether the defendant Kimmel was a resident of Warren county, so as to give the court jurisdiction of a defendant in another county, under section 2 of the Practice act, and this being a question of fact and having been decided adversely to appellant by the Appellate Court, its judgment is final. Under the second, appellant urges that to authorize suit against him, a resident of

Franklin county, in a court in Warren county, his liability, and that of Kimmel, his co-defendant, must be a joint liability, and that appellant's liability as maker and the liability of Kimmel as endorser is not, under our statute, a joint liability, although the statute authorizes a joint action in such cases. If appellant desired to preserve that question for the consideration of this court he should have presented to the trial court a proposition to be held or refused by that court under section 42 of the Practice act, and the holding of the trial court thereon could have been reviewed by this court.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THE COAL BELT ELECTRIC RAILWAY COMPANY

v.

GEORGE W. KAYS.

*Opinion filed February 17, 1904.*

1. APPEALS AND ERRORS—*statutory conditions for appeal must be complied with.* The right of appeal is conferred by statute, and can only be exercised by complying with the statutory conditions.

2. SAME—*time fixed by trial court for filing bond does not extend statutory time for filing transcript.* The fact that the time fixed by the trial court for filing the appeal bond and bill of exceptions extends beyond the second day of the succeeding term of the Appellate Court does not extend the time fixed by section 72 of the Practice act for filing the transcript.

3. SAME—*section 72 of Practice act controls time for filing transcript.* If twenty days intervene between the last day of the term of the trial court and the sitting of the court to which an appeal is taken, the transcript must be filed on or before the second day of the term, as required by section 72 of the Practice act, unless the appellate tribunal grants further time for good cause shown.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Williamson county; the Hon. O. H. HARKER, Judge, presiding.

WILLIAM H. WARDER, for appellant.

W. A. SCHWARTZ, (SPILLER & WHITE, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On August 3, 1903, the circuit court of Williamson county entered a judgment in favor of appellee, against appellant, for \$3000 and costs. The appellant prayed an appeal to the Appellate Court for the Fourth District, which was allowed, and thirty days were given to file an appeal bond and the time for filing a bill of exceptions was extended sixty days. The day on which the judgment was entered was the last day of the May term and on that day the court adjourned for the term. The next term of the Appellate Court for the Fourth District was fixed by statute to begin on the fourth Tuesday in August, 1903, which was August 25, and on that day the Appellate Court convened for that term. Twenty-two days intervened between the last day of the term, at which the judgment appealed from was entered, and the sitting of the Appellate Court. On August 28, 1903, appellant filed its appeal bond, duly approved, with the clerk of the circuit court. It did not file with the clerk of the Appellate Court any transcript of the record nor obtain an extension of time to file the same. On September 10, 1903, the appellee filed in said Appellate Court a transcript of the record of the circuit court, showing the judgment and allowance of the appeal, the adjournment for the term and the filing of the appeal bond, and moved the court to dismiss the appeal on the ground that no transcript of the record was filed in said court as required by law. Appellant thereupon entered its cross-motion for an extension of time in which to file such transcript, assigning as reasons in support of its motion that the circuit court allowed thirty days for filing an

appeal bond; that the appeal bond was filed within the time so allowed, two days after the second day of the August term of the Appellate Court; that sixty days were allowed for filing a bill of exceptions, and that appellant had been unable to secure a copy of the evidence, so as to make a bill of exceptions and secure a transcript in time to file it at the August term. The motion was supported by an affidavit that the appeal bond was filed as soon as possible, and that the appellant had been unable to secure a copy of the evidence, and therefore could not file a bill of exceptions or secure a copy of the record in time for the August term. The Appellate Court denied the cross-motion of appellant, allowed the motion of appellee and dismissed the appeal, with five per cent damages on the amount of the judgment. From the judgment dismissing the appeal and assessing damages against it appellant prosecuted this appeal.

The right of appeal is conferred by statute and can only be exercised by complying with the statutory conditions. By section 72 of the Practice act it is provided that authenticated copies of records, orders and decrees appealed from shall be filed in the office of the clerk of the Appellate Court on or before the second day of the succeeding term of said court, if twenty days shall have intervened between the last day of the term at which the judgment, order or decree appealed from shall have been entered and the sitting of the court to which the appeal shall be taken, otherwise the said appeal shall be dismissed, unless further time to file the same shall have been granted by the court to which said appeal shall have been taken, upon good cause shown. Section 73 provides that when appeals are dismissed by the Appellate Court for failing to file authenticated copies of records as required by law, the court shall enter judgment against the appellant for not less than five nor more than ten per cent damages on the amount recovered in the inferior court. (Hurd's Stat. 1899, p. 1294.)

Appellant contends that these provisions are modified or controlled by section 67 of the same act for the allowance of an appeal, which provides that the party praying for such appeal shall file an appeal bond within such time, not less than twenty days, as shall be limited by the court. Its position is, that if the time so limited extends beyond the second day of the succeeding term of the Appellate Court it is not necessary to file the transcript by that time. It is true that the circuit court had power to fix thirty days as the time within which appellant should file its appeal bond, that the appeal was not perfected until the bond was filed, and that the Appellate Court could not take jurisdiction of the case or hear a motion to extend the time for filing a transcript until the appeal was perfected by filing the bond; but the circuit court could not defeat the plain provision of the statute for filing the transcript by extending the time for filing the bond or bill of exceptions. A trial court cannot fix a less time than twenty days for filing an appeal bond and may grant a longer time, but if twenty days intervene between the last day of the term of that court and the sitting of the Appellate Court, the provisions of section 72 as to filing the transcript must control. In every such case the transcript must be filed as required by that section, unless further time has been granted by the court for good cause shown. (*Swafford v. Rosenbloom*, 189 Ill. 392; *Fonda v. Jackson*, 203 id. 113.) The extension of time can only avail the appellant so far as it will not conflict with the requirement for filing the transcript.

The statute requires the Appellate Court to assess damages upon dismissing an appeal for failure to file the transcript as required by law, and as there was such a failure in this case it was not error for the Appellate Court to assess the damages. *Swafford v. Rosenbloom*, *supra*.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

HERMAN E. DICK

v.

JOHN ZIMMERMAN.

*Opinion filed February 17, 1904.*

1. EVIDENCE—*what is not proper cross-examination as to an account stated.* Where plaintiff in an action of assumpsit on an account stated testifies only as to the interviews and correspondence resulting in the agreement fixing the sum due, he cannot be cross-examined regarding the correctness of items of the account.

2. SAME—*when copies of letters are properly admitted.* Proof that one letter written by plaintiff to defendant was properly addressed and mailed and that the receipt of another letter was acknowledged by the defendant, is sufficient proof of delivery of the two letters to authorize the admission of copies thereof in evidence.

3. APPEALS AND ERRORS—*exceptions must be taken to improper rulings to preserve them for review.* Error in admitting in evidence a copy of plaintiff's declaration, with a statement of his account and affidavit of merits attached thereto, cannot be taken advantage of on appeal, where no exception was taken to the ruling of the court admitting the same.

*Dick v. Zimmerman*, 105 Ill. App. 615, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

This was a suit in assumpsit in the circuit court of Cook county by appellee, against appellant, which resulted in a verdict of \$1420 for appellee, and judgment thereon for that amount. The judgment has been affirmed by the Appellate Court for the First District, and the case is now brought to this court by appeal.

The declaration consisted of the common counts, and attached thereto was a copy of the account sued on and an affidavit of the amount due. Appellant pleaded the general issue and set-off.

Appellee introduced no evidence to prove the items of account, but relied solely on an account stated, and it appears from his testimony that at the request of appel-

lant he had submitted the account to him, and after an examination thereof appellant had conceded it to be correct and had promised to pay it on the following day, but failed to do so because his bank account was not as large as he thought it was, but promised to send the amount from England, as he was going there and had money on deposit in that country. Appellee further testified that at the request of appellant he mailed to him an itemized statement identical with the statement of account attached to the declaration. Appellee offered a copy of a letter dated October 12, 1898, addressed to appellant in New York City, enclosing a copy of the account.

The copy of another letter written by appellee to appellant, dated January 4, 1899, was objected to on the ground that the only proof of the delivery thereof was, that it was the general custom of business men in Chicago to dictate letters to a stenographer, sign them when typewritten, and leave the addressing, stamping and mailing to clerks, and that this was also the custom of appellee; that he dictated this letter, signed it after it had been written, and that it then took the usual course, and presumably was mailed to appellee by a clerk in the performance of the usual duties of employment. There was no direct evidence that this letter had been mailed. The letter expressed appellee's disappointment in not receiving the amount as per bill sent to appellant, and requested payment.

A copy of still another letter, dated November 1, 1898, written by Zimmerman to Dick, referring to the account and to an understanding that a check would be sent, and requesting appellant to remit the amount as he had agreed, was read in evidence. The testimony relied on to prove the delivery of this letter is, that appellee dictated this letter to a typewriter, signed it, and mailed it himself.

Appellant, on his cross-examination of appellee, attempted to show the transaction out of which the account

arose and to show that the items were not correct, but the court refused to permit him to do so, stating that there was nothing to cross-examine him about except the interviews and the letters.

Appellant denied admitting the correctness of the account in his conversation with appellee, and testified to facts tending to show that the account, and the items included in it, were erroneous and not owing to appellee.

ZACH HOFHEIMER, for appellant.

DALE & FRANCIS, for appellee.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This suit was tried on the part of the plaintiff upon that count of the *narr.* declaring upon an account stated. He testified in his own behalf to interviews with the defendant in which the account was presented to the defendant, discussed between them, agreed upon as correct, and that in the last of these interviews defendant agreed to pay the balance shown by the statement of the account, and plaintiff also testified to the writing of three letters by himself to the defendant, copies of which were admitted in evidence, and to other matters tending to show that the defendant received each of the three letters. On cross-examination counsel for defendant sought to examine plaintiff regarding the correctness of certain items included in the account. The court sustained an objection, saying, "There is nothing to cross-examine him about except these interviews he has testified to and these letters," and it is urged that the right of cross-examination was thereby improperly limited, and that, in any event, the remark of the court was improper, for the reason that the jury would conclude therefrom that the only matters for determination in the case were in reference to the interviews and the letters about which plaintiff had testified. The ruling was correct. Plaintiff was not asking to recover upon the original account, but

upon the alleged agreement or account stated, by which the amount due was fixed.

"In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained." *Throop v. Sherwood*, 4 Gilm. 92.

Plaintiff had testified only in reference to the interviews, resulting, as he said, in an agreement fixing the sum due, and in relation to the letters, and the cross-examination was properly confined to the same matters. The remark of the court was a terse and accurate statement of the law applicable to the situation and could have had no prejudicial effect with the jury, because the defendant was afterwards permitted to offer evidence showing the condition of the accounts between the parties on his theory of the case.

It is also urged that the court erred in admitting in evidence copies of three letters written by plaintiff to defendant, for the reason that there was no proof of the delivery of the originals. The delivery of the letter of October 12, 1898, was shown by a letter written by the defendant acknowledging receipt thereof. The letter of November 1, 1898, is shown to have been properly addressed and mailed by the plaintiff himself, from which the presumption arises that it reached the addressee. The copies of these two letters were properly admitted. Whether the evidence offered raises a presumption that the letter of January 4, 1899, was received by the defendant is not material. That letter contained nothing bearing on this case except an expression of regret that Dick had not remitted the amount due, as he had agreed before he left Chicago. As each of the other letters contained similar statements, we do not think the admission of this letter would constitute reversible error in any event.

There was also admitted in evidence, on the part of the plaintiff, his declaration in this case, with the statement of the account and affidavit of merits thereto attached. This was unquestionably improper, but the defendant did not preserve an exception to the ruling of the court in admitting these documents, and cannot, therefore, now have any advantage thereof. The action of the court seems to have been based upon the theory that the statement attached to the declaration was the original statement of account which plaintiff testified the parties had agreed to as correct.

The defendant, on his part, sought to show that there had been no agreement in reference to the amount due, and that the items in the account were in part incorrect, and that as to the remainder, plaintiff was indebted to him in a greater sum on account of transactions arising prior to the time when, according to the testimony of the plaintiff, the affair passed into an account stated. The jury were properly instructed and returned a verdict in favor of the plaintiff for the full amount claimed. The judgment rendered thereon has been affirmed by the Appellate Court, and as there was evidence tending to prove that this amount was due from the defendant to the plaintiff, we are precluded by the judgment of the last mentioned court from considering the objection urged upon us now, to the effect that the verdict was contrary to the weight of the evidence.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

# INDEX.

<b>ABANDONMENT.</b>	<b>PAGE.</b>
an equivocal intention by widow to return to homestead is not sufficient to prevent an abandonment.....	328
abandonment of homestead by widow is binding upon the minor children .....	328
<b>ABSTRACT OF RECORD.</b>	
index to abstract of record is a necessary requirement....	46
cost of additional abstract of record will not be taxed to appellant if it was unnecessary.....	136
abstract of record should be supplied with complete index, alphabetically arranged .....	604
<b>ABSTRACT OF TITLE.</b>	
proper foundation must be laid for the introduction of abstract of title in proceeding to register title .....	69
<b>ACTIONS AND DEFENSES.</b>	
re-marriage of plaintiff in an action for alleged negligent killing of her first husband cannot be considered by the jury in mitigation of damages .....	9
drainage commissioners may bring <i>mandamus</i> to compel a town to levy tax to pay assessment confirmed against it under the Levee act, without a judgment at law.....	17
special assessment proceeding against school property not part of the school section nor derived therefrom is not a suit against the State.....	37
fact that school property cannot be sold does not defeat a special assessment against it .....	37
judgment of reversal for particular error confessed is not <i>res judicata</i> as to other assignments of error urged but not considered in the court of review.....	61
when action of trespass involves a freehold.....	88
possession such as is contemplated by the Limitation act must be adverse, actual, visible, exclusive, continuous and under claim of ownership .....	88
commissioners of drainage district organized under Farm Drainage act of 1879 may be compelled to levy assessments and make repairs.....	97

ACTIONS AND DEFENSES.— <i>Continued.</i>	PAGE.
liability of guarantor of a note is not released by payee's negligence in demanding payment.....	116
extent to which approval of a master's sale to guardian is <i>res judicata</i> on question of his title.....	215
when equity is the proper forum for enforcing rights under a party-wall agreement.....	238
when doctrine of estoppel by delay does not apply.....	238
<i>mandamus</i> should not issue in a doubtful case.....	316
<i>mandamus</i> will not lie to compel a county clerk to extend a tax on assessment which has been removed from the books by the board of review.....	469
when judgment in trespass <i>quare clausum fregit</i> is a bar to action of ejectment.....	517
fact that party is entitled to second trial in ejectment does not prevent judgment in trespass <i>quare clausum fregit</i> from being <i>res judicata</i> .....	517
eligibility to office must be questioned by <i>quo warranto</i> , and not by a proceeding to contest party's election to office..	528

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION.

possession such as is contemplated by the Limitation act must be adverse, exclusive, actual, visible, continuous and under claim of ownership.....	88
what does not tend to show claim of title.....	89
effect where tenant of grantor is in possession.....	89
grantor's possession of strip of land not included in deed cannot be tacked to possession of grantee unless possession was actually delivered.....	89
when renting of land is not a recognition of title which interrupts the running of the Statute of Limitations.....	253
possession must be exclusive to operate as notice of rights under unrecorded deed.....	258

ALIEN LABOR.—See SPECIAL ASSESSMENTS.

ALIMONY.

when wife may be given title to land in lieu of alimony....	308
---	-----

AMENDMENTS.

when the certificate of drainage commissioners cannot be amended so as to sustain a repair tax based thereon.....	50
when amendment to appropriation ordinance is void.....	79
amendments to objections to application for judgment of sale should be permitted if made in apt time.....	312

AMENDMENTS.— <i>Continued.</i>	PAGE.
what amendment to objection is proper.....	312
when amendment of judgment is not a final order which is subject to appeal or writ of error.....	337
when amendment of judgment does not change the rights of the parties.....	337
party is not entitled, as of right, to amend a pleading re- gardless of what the amendment is to be.....	528
there is no presumption that a proposed amendment not presented will be a proper one.....	528
when refusal of leave to amend is not error.....	528
when record of highway commissioners cannot be amended so as to sustain road and bridge tax.....	566

#### APPEALS AND ERRORS.

the revenue is involved in <i>mandamus</i> by drainage commis- sioners to compel a town to levy and collect a drainage assessment confirmed against it.....	17
on appeal from a decree awarding initial registration of title and canceling defendant's tax deed, defendant may urge that the proof of title was insufficient.....	26
whether the evidence shows giving of notice by highway commissioners of meeting to consider petition for new road is a question of fact for Appellate Court.....	34
when record presents no question for Supreme Court.....	34
alleged error in denying motion for continuance in chan- cery case not considered if affidavit in support of motion is not preserved in certificate of evidence.....	46
it is not sufficient that an affidavit in support of motion for continuance is copied into the record by the clerk.....	46
going to trial before same judge without objection, after obtaining a change of venue, waives the objection of his disqualification.....	46
abstract of record should be indexed.....	46
if irregularity in the form of a judgment of sale is the only error, the case will be reversed with directions to enter a proper judgment.....	61
when appeal in trespass is properly taken directly to the Supreme Court as involving a freehold.....	88
cost of additional abstract of record will not be taxed to appellant if it was unnecessary.....	136
section 61 of Practice act, allowing parties to agree to trial of matters of law and fact by the court without a jury, does not authorize Supreme Court to review facts.....	150
to preserve questions of law for review where case is tried without a jury, propositions of law should be submitted.	150
effect of section 61 of Practice act.....	150
when party cannot complain of instructions.....	172

APPEALS AND ERRORS.—*Continued.*

PAGE.

if instructions for both parties proceed on wrong theory neither can complain of such error.....	226
objection to deed not made when same was offered in evi- dence cannot be urged on appeal.....	238
appeal must be dismissed if perfected by only one of the parties to whom it was jointly allowed.....	235
section 11 of article 6 of the constitution does not authorize appeals to Supreme Court in criminal cases.....	247
right of appeal is purely statutory.....	247
criminal cases must be reviewed by writ of error, as there is no statutory provision in Illinois for an appeal therein..	247
amount involved on appeal in action <i>ex contractu</i> is deter- mined from the pleadings, if there was no trial of an issue of fact in the lower court.....	250
when accumulation of interest does not confer appellate jurisdiction as increasing amount involved.....	250
when action of circuit court in refusing to dismiss appeal from justice of peace will be presumed to be correct....	280
when recital in a divorce decree that defendant had been guilty of adultery must prevail on writ of error.....	308
when order amending judgment is not a final order which is subject to appeal or writ of error.....	337
when absence of judge from court room during argument of counsel will not reverse.....	400
scope of cross-examination is largely a matter of discretion with the trial court.....	400
counsel entitled to reasonable latitude in argument.....	400
freehold is not involved in petition by administrator to pay debts unless title is put in issue.....	410
when order dismissing bill may be reviewed though com- plainants failed to amend bill within time allowed.....	411
when writ of error will not be dismissed for mis-joinder of parties .....	411
propositions of law are properly refused where they are not applicable to the facts or where they present mixed questions of law and fact.....	443
when refusal to grant continuance is proper.....	452
limiting number of instructions on a side will not reverse where the restriction is not shown to be prejudicial....	452
giving instruction after court has erased its interlineations is not reversible error.....	452
court may limit effect of instruction to the count contain- ing the charges the instruction covers.....	452
when alleged error in giving and refusing instructions can not be considered.....	486
special interrogatories propounded by the court of its own motion should first be submitted to counsel.....	486

APPEALS AND ERRORS.— <i>Continued.</i>	PAGE.
when failure of court to submit special interrogatory to counsel is prejudicial error.....	486
when refusal of leave to amend is not error .....	528
party is not entitled, as of right, to leave to amend pleading regardless of what the amendment is.....	528
effect where Appellate Court recites the ultimate facts in its judgment in a suit at law.....	531
when appellant cannot complain of evidence.....	531
when finding by the Appellate Court as to when the insured became member of lodge is final.....	540
motion to quash summons and service is properly denied when delayed until after the jury is selected and sworn..	540
whether a freehold is involved on a bill to remove a cloud depends upon the nature of the cloud.....	562
freehold is not involved on bill to cancel as a cloud a conditional contract to convey the land.....	562
objection of variance between allegations and the proof cannot be first raised on appeal.....	576
one cannot complain of error not prejudicing his interests.	583
when it will be presumed, on appeal in chancery, that the evidence sustained the decree although the evidence is not preserved in the record.....	604
abstract of record should be supplied with a complete index, alphabetically arranged.....	604
amount in controversy does not govern Supreme Court's jurisdiction of appeal from proceeding to enjoin collection of judgment wrongfully obtained.....	621
recitals of decree that the court had jurisdiction and that the allegations of the bill are true do not supply the place of a certificate of evidence.....	621
in order to sustain a decree granting the prayer of the bill the complainant must preserve the evidence.....	621
when a certificate of importance presents no question for consideration by Supreme Court.....	630
whether defendant was a resident of the county where suit was brought is a question of fact .....	630
questions of law cannot be considered by Supreme Court unless properly preserved for review.....	630
statutory conditions of appeal must be complied with....	632
time fixed by trial court for filing appeal bond and bill of exceptions does not extend time for filing transcript of record in Appellate Court.....	632
section 72 of Practice act controls time for filing transcript.	632
exceptions must be taken to improper rulings on evidence to preserve them for review.....	636

APPOINTMENT.—See POWERS.

ASSESSMENT FOR TAXATION.—See TAXES.

ASSUMED RISK.—See MASTER AND SERVANT.

ATTORNEYS AT LAW.—See SOLICITORS' FEES.

BAILMENTS.	PAGE.
when miller is not liable for loss of grain by fire.....	296
when time of agreement permitting miller to mix grain is not material.....	296
millar who receives grain for safe keeping as an accommodation to the owner and without reward is held to use of ordinary care and diligence, only .....	296

#### BENEFIT SOCIETIES.

benefit certificates are taxable to beneficiaries as credits although proofs of death have not been made by April 1.	472
benefit certificates are presumed to be worth their face value when assessing them for taxation .....	472
when judgment of the Appellate Court as to when insured became member of lodge is final .....	540

#### BILLS AND NOTES.

liability of a guarantor not released by payee's negligence in demanding payment.....	116
the law of the place where a note was delivered and negotiated controls the liability of the parties.....	126
an endorsement on back of non-negotiable instrument does not create the liability of an endorser or guarantor within the law merchant.....	126
written promise to pay a sum of money with interest "and taxes" is not a promissory note, when the amount of such taxes is uncertain.....	126
when word "taxes" in a written promise to pay money can not be rejected as surplusage.....	126

#### BOARDS OF EDUCATION.—See SCHOOLS.

the Chicago board of education has implied power to sue and be sued.....	37
payment of valid special assessment against school property is a proper application of funds of the district .....	37

#### BOARDS OF REVIEW.

benefit certificates are taxable as credits though proofs of death are not made by April 1 and they are not payable until after such proofs.....	472
benefit certificates are presumed to be worth their face value when assessing them for taxation .....	472

## BONDS.

## PAGE.

a city organized under the general law may issue twenty-year bonds for corporate purposes.....	492
issuing bonds to pay judgment indebtedness of city is pledging its credit for a corporate purpose.....	492
notice of an election under act of 1879, relating to issue of bonds by city, need be published but once.....	493
judgment against a city is an evidence of an indebtedness, under the act of 1879 authorizing new bonds to replace old bonds and other evidences of indebtedness.....	493

## BURDEN OF PROOF.

one claiming a change of an established residence has the burden of proof .....	180
to warrant cancellation of tax deed in partition complainant must prove it invalid, the same as on a bill to remove a cloud from title .....	192

## CARRIERS.—See RAILROADS.

a railroad company is entitled to a reasonable car service fee after allowing consignee a reasonable time to unload.	199
lien for car service fee need not arise from specific contract.	199
distance consignee must haul freight when unloading car is not an element bearing upon the reasonableness of the time allowed to unload.....	199

## CASES CONTROLLED BY OTHERS.—See FORMER CASES.

<i>Crozer v. People</i> , 206 Ill. 464, controls the decision in <i>Pike v. People</i> .....	36
<i>Crozer v. People</i> , 206 Ill. 464, controls the decision in <i>Bowyer v. People</i> .....	55
<i>Gage v. People</i> , ( <i>ante</i> , p. 61,) controls the decision in <i>Gage v. People</i> .....	73
<i>Gage v. People</i> , ( <i>ante</i> , p. 61,) controls the decision in <i>Ryan v. People</i> .....	74
<i>Chicago Union Traction Co. v. Chicago</i> , 204 Ill. 363, controls the decision in <i>Chicago Union Traction Co. v. Chicago</i> .....	607

## CEMETERIES.

land may be dedicated for cemetery, and it is a sufficient dedication if owner sets aside land for such purpose and assents to its use as such.....	411
owner of land set apart and used for a cemetery with his consent may be enjoined from interfering.....	411
any person having relatives or friends buried in cemetery dedicated by owner of land may file bill to enjoin his desecration of graves.....	411

## CHANCERY.—See EQUITY.

<b>CHANGE OF VENUE.</b>	<b>PAGE.</b>
going to trial before the same judge without objection, after obtaining a change of venue, waives the objection of his disqualification.....	46
<b>CITIES.—See MUNICIPAL CORPORATIONS.</b>	
<b>CLOUD ON TITLE.—See REGISTRATION OF TITLES.</b>	
<i>prima facie</i> proof of title in complainant does not warrant decree canceling tax deed unless it is alleged and proved such deed is invalid.....	26
to warrant cancellation of tax deed in partition complain- ant must prove it invalid, the same as on a bill to remove a cloud from title.....	192
when decree in partition is equivalent to cancellation of a tax deed as a cloud.....	192
recital in a partition decree that defendant has failed to show any title under his tax deed does not cure failure to prove the deed invalid.....	192
whether a freehold is involved on a bill to remove a cloud depends upon the nature of the cloud.....	562
freehold is not involved on a bill to cancel as a cloud a con- ditional contract to convey the land.....	562
<b>COLLATERAL ATTACK.</b>	
appointment of a special commissioner to make sale and execute deed is not ground for collateral attack on the foreclosure decree .....	238
lack of jurisdiction to confirm an assessment must appear from the face of the record in order to be available for collateral attack.....	334
<b>COMMERCIAL PAPER.—See BILLS AND NOTES.</b>	
<b>CONFLICT OF LAWS.</b>	
law of place where note was delivered and negotiated con- trols the liability of the parties.....	126
the common law rule as to a married woman's property is presumed to prevail in foreign State.....	340
the Illinois statute concerning property rights of married women does not divest rights acquired by a husband in a foreign State at common law .....	340
<b>CONSTITUTIONAL LAW.</b>	
section 11 of article 6 of the constitution does not authorize appeals to Supreme Court in criminal cases.....	247
act of 1901, requiring corporations to report annually to the Secretary of State, is constitutional.....	352

CONSTITUTIONAL LAW.—*Continued.*

PAGE.

appointment of administrator constitutes part of practice of courts of justice within the meaning of the constitutional inhibition against special laws.....	385
that part of section 18 of Administration act requiring appointment of public administrator in certain counties, if deceased was a non-resident, is void.....	385
what essential to classification of counties by population in order to avoid special legislation.....	385
that part of section 18 of Administration act authorizing widow or next of kin to nominate party to the court to act as administrator is valid.....	385
what items should be considered and what excluded in estimating city's total indebtedness.....	493
right of employer and employee to contract for labor is both a liberty and a property right, which is free from legislative interference.....	624
legislature has no power to provide that the owner of property shall not sell it to another and agree with the latter to accept work in payment.....	624
exclusion of farmers from act prohibiting employers from setting off debts of employees against claims for wages renders it a discrimination.....	624
act of 1891, prohibiting mine operator or manufacturer from setting off debts of employees against claims for wages, is unconstitutional.....	624

## CONSTRUCTION.

laws which exempt property from taxation are to be construed strictly.....	37
statute will be given prospective effect only, unless a contrary intention is clearly manifested.....	97
of section 47½ of Drainage act of 1885, as not authorizing dissolution of drainage districts organized under prior acts repealed by the act of 1885.....	97
of written instrument, as not being a promissory note.....	126
when word "taxes" in written promise to pay money can not be rejected as surplusage.....	126
of section 77 of Administration act, concerning specific award, as applying although the deceased householder was a widow.....	136
age and financial condition of female child do not affect her right to specific award under section 77 of Administration act.....	136
of word "family," used in section 74 of the Administration act, as including servants of deceased householder at the time of his death.....	136

CONSTRUCTION.—*Continued.*

PAGE.

fact that daughter contributed towards household expenses does not defeat her right to specific award on the ground she was a boarder.....	136
of section 61 of Practice act, allowing parties to agree to trial of matters of law and fact by the court, as not authorizing Supreme Court to review the facts.....	150
effect of section 61 of Practice act.....	150
of section 34 of Practice act, as to effect of failure to deny, under oath, the execution of a contract.....	172
term "active business," used in act of 1901, requiring corporations to make annual reports, means doing the things the corporation was organized to do.....	352
of act of 1901, requiring corporations to make annual reports, as including corporations not for pecuniary profit.....	352
of act of 1901, as making a failure to report annually <i>prima facie</i> evidence of non-user but not as working an absolute forfeiture of charter.....	352
of act of 1901, requiring corporations to report annually to Secretary of State, as being constitutional.....	352
of that part of section 18 of Administration act requiring appointment of public administrator in certain counties, if deceased was a non-resident, as void.....	385
of that part of section 18 of Administration act authorizing widow or next of kin to nominate party to the court to act as administrator, as being valid.....	385
of section 18 of Administration act, as authorizing a non-resident widow or next of kin to nominate administrator.....	385
of will, as to when power of appointment is discretionary as to the division of the property.....	430
of will, as to when trust is active and is not void for uncertainty of its objects.....	534
if two clauses of a will are repugnant the later prevails...	534
of will, as to when devise of residue applies to all of the testator's remaining property.....	611
of will, as to when children take a life estate.....	611
testator's intention is not to be determined from a single clause of the will, but from the entire will.....	611
it is presumed the testator intended to dispose of his entire estate by the will and not to leave any part of it as intestate property.....	611
when word "remainder" need not be given its technical meaning.....	611
of act of 1891, prohibiting mine operator or manufacturer from setting off debts of employees against claims for wages, as unconstitutional.....	624

## CONTESTED ELECTIONS.—See ELECTIONS.

CONTINUANCE.	PAGE.
alleged error in denying motion for continuance in chancery case not considered if affidavit in support of motion is not preserved in certificate of evidence.....	46
it is not sufficient that an affidavit for continuance is copied into the record by the clerk.....	46
when refusal to grant continuance is proper.....	452

# CONTRACTS.

written promise to pay a sum of money with interest "and taxes" is not a promissory note where the amount of such taxes is uncertain.....	126
endorsement on the back of a non-negotiable instrument does not create the liability of an endorser or guarantor within the law merchant.....	126
when city is not liable for balance due contractor on public improvement made by special assessment.....	151
failure to deny, under oath, the execution of contract does not preclude evidence explaining meaning of contract..	172
all writings evidencing the same agreement and executed at the same time are admissible .....	172
what facts may be shown in justification of discharge of a plaintiff from defendant's employ.....	172
when conversation and letter are admissible in evidence as part of the contract of employment .....	172
a condition of employment of a married man as traveling salesman that he will not associate with certain women to whom he owes no legal obligation is valid.....	172
a party wall means a solid wall, unless the agreement provides otherwise.....	238
when equity is the proper forum for enforcing rights under party-wall agreement.....	238
when contract is not an absolute release of liability.....	291
a contract cannot be binding in part, only.....	423
proposed vendee cannot remove fixtures attached under a contract of purchase.....	443
contract of a corporation is admissible in evidence though abbreviation "Mfg." is used in its name and though the contract is not under seal.....	443
when forfeiture of contract by vendor is unnecessary.....	443
the right of employer and employee to contract for labor is both a liberty and a property right, which is free from legislative interference.....	624
legislature has no power to provide that the owner of property shall not sell it to another and agree with the latter to accept work in payment.....	624

CONTRIBUTORY NEGLIGENCE.—See NEGLIGENCE.

## CORPORATIONS.—See MUNICIPAL CORPORATIONS PAGE.

when an insurance company is under legislative control though organized under a special charter .....	316
if an insurance company ceases to transact business for one year its charter becomes extinct, the same as though it had expired by its own limitation.....	316
the term "active business," used in act requiring annual reports, means the doing of the things the corporation is authorized to do by its charter.....	352
act of 1901, requiring annual report to Secretary of State, includes corporations not for pecuniary profit.....	352
failure to make annual report under act of 1901 makes a <i>prima facie</i> case of non-user but does not work absolute forfeiture of charter.....	352
corporations organized under the general law are subject to statutory regulation .....	352
act of 1901, requiring annual report, is constitutional....	352
contract of a corporation is admissible in evidence though abbreviation "Mfg." is used in its name and though the contract is not under seal.....	443

## COSTS.

when costs in <i>mandamus</i> are properly adjudged against the defendant town .....	17
cost of additional abstract of record will not be taxed to appellant if it was unnecessary.....	136

## COUNTY CLERKS.

county clerk can extend taxes only as they appear in the books, and he has no power to determine whether the taxes are legally assessed.....	469
<i>mandamus</i> will not lie to compel county clerk to extend a tax upon an assessment which has been removed by the board of review .....	469

## COURTS.—See APPEALS AND ERRORS; EQUITY.

when appeal in trespass is properly taken directly to the Supreme Court, as involving a freehold.....	88
Supreme Court cannot review facts in suit at law though the case was tried before the court without a jury, on a stipulation of facts.....	150
appointment of administrator constitutes part of the practice of courts of justice, within the meaning of the constitutional inhibition against special laws.....	385
effect where Appellate Court recites the ultimate facts in its judgment reversing a judgment at law without remanding the cause.....	531

<b>COURTS.—Continued.</b>	<b>PAGE.</b>
amount in controversy does not govern Supreme Court's jurisdiction of an appeal in a proceeding to enjoin collection of judgment wrongfully obtained.....	621
time fixed by trial court for filing appeal bond and bill of exceptions does not extend time for filing transcript of record in Appellate Court.....	632
<b>CREDITORS.—See DEBTOR AND CREDITOR.</b>	
<b>CRIMINAL LAW.</b>	
section 11 of article 6 of the constitution does not authorize appeals to the Supreme Court in criminal cases.....	247
criminal cases must be reviewed on writ of error, as there is no statutory provision in Illinois for an appeal therein.	247
<b>CROPS.</b>	
in absence of reservation in deed, crops not severed from the soil, though mature and ready to be gathered, pass to grantee upon delivery of deed.....	287
<b>CROSS-BILL.—See PLEADING.</b>	
<b>CROSS-EXAMINATION.—See TRIAL.</b>	
<b>DAMAGES.</b>	
re-marriage of plaintiff in an action for alleged negligent killing of her first husband cannot be considered by the jury in mitigation of damages .....	9
<b>DEBTOR AND CREDITOR.</b>	
it is the right and duty of a creditor to diligently guard and protect effects held by him as security for the debt..	291
when contract is not an absolute release of liability.....	291
<b>DECREES.—See JUDGMENTS AND DECREES.</b>	
<b>DEDICATION.</b>	
law implies an intention to dedicate road from any acts of owner indicating the same, and upon acceptance by the public the dedication is complete.....	280
owner's testimony as to intention will not prevail against his acts inconsistent with such intention where the public relied upon his acts.....	281
public may rely upon acts of land owner indicating intention to dedicate land for highway.....	281
user for any particular period is not required where an intention to dedicate is clearly implied and the dedication was accepted by the public.....	281

**DEDICATION.—Continued.****PAGE.**

- land may be dedicated for a cemetery, and it is a sufficient dedication if owner sets apart land for a cemetery and assents to its use as such..... 411

**DEEDS.**

- recording of deed is not conclusive evidence of delivery... 104  
 what evidence does not show absolute delivery of deed.... 104  
 presumption of delivery of deed from parent to adult child is not so strong as in case of minor child..... 104  
 fact that grantor continued in possession of land is against presumption of absolute delivery ..... 104  
 grantor must have notice of acts of ownership by grantee in order to be bound thereby..... 104  
 what evidence sufficient to sustain a decree setting aside deed for fraud and misrepresentation..... 222  
 possession must be exclusive to operate as notice of rights under an unrecorded deed..... 258  
 widow's latent equities under an unrecorded deed are waived where she joins in a deed with the holder of the apparent record title..... 258  
 in absence of reservation in deed, crops not severed from the soil, though mature and ready to be gathered, pass to the grantee upon delivery of the deed..... 287

**DELIVERY.—See DEEDS.****DEMAND.**

- liability of guarantor of note is not released by payee's negligence in demanding payment..... 116

**DEMURRAGE.**

- railroad company is entitled to a reasonable car service fee after allowing consignee a reasonable time to unload. 199  
 lien for car service fee need not arise from specific contract 199  
 distance consignee must haul freight when unloading car is not an element bearing upon reasonableness of time allowed to unload..... 199

**DESCENT.**

- when child of deceased devisee will take under section 11 of Statute of Descent though no provision for such case is made in the will..... 266

**DIVORCE.**

- when recital of decree that defendant had been guilty of adultery must prevail on writ of error..... 308  
 when wife may have title to real estate in lieu of alimony. 308

## DOMICILE.

PAGE.

- the "residence" intended by Inheritance Tax act is synonymous with "domicile" or "abode"..... 180  
 residence once established is presumed to continue. .... 180  
 declarations have but little weight on question of change of residence if inconsistent with the party's acts..... 180  
 mere intention to change residence is not sufficient..... 180

## DRAINAGE.

- objections to a drainage assessment under the Levee act which might have been urged at time the assessment roll was confirmed are waived..... 17  
 objections to jurisdiction of county court to confirm drainage assessment will not be sustained in a collateral proceeding unless they appear from the record of that court. 17  
 drainage commissioners may bring *mandamus* to compel a town to levy tax to pay drainage assessment confirmed against it under the Levee act, without judgment at law. 17  
 the statute provides for the levy of a tax to pay drainage assessment confirmed against a town under the Levee act. 17  
 power of drainage commissioners to impose a tax is limited and must be strictly construed..... 50  
 when certificate of drainage commissioners is insufficient to sustain tax and cannot be amended to validate tax... 50  
 section 47½ of act of 1885, added in 1889, authorizing dissolution of drainage district, refers only to districts organized under the act of 1885..... 97  
 drainage district organized under prior acts repealed by the act of 1885 cannot be dissolved under section 47½ of such act, added in 1889..... 97  
 commissioners of drainage district organized under Farm Drainage act of 1879 may be compelled to levy assessments and make repairs..... 97

## EASEMENTS.

- owner of easement in stream is entitled to mandatory injunction to compel removal of obstruction..... 345  
 a mandatory injunction to compel restoration of water to natural channel lies, whether the channel is a natural water-course or an artificial ditch..... 345

## EIGHT-HOUR DAY.—See SPECIAL ASSESSMENTS.

## EJECTMENT.

- when judgment in trespass *quare clausum fregit* is a bar to action of ejectment..... 517  
 fact that party is entitled to second trial in ejectment does not prevent judgment in trespass *quare clausum fregit* from being *res judicata*..... 517

## ELECTIONS.

PAGE.

notice of election under the act of 1879, relating to issue of bonds by city, need be published but once.....	493
jurisdiction on election contest is limited to the question of who was elected.....	528
eligibility to office must be questioned by <i>quo warranto</i> , and not by a proceeding to contest party's election to office..	528
rule as to validity of nomination papers.....	528

EMPLOYMENT.—See MASTER AND SERVANT.

ENDORSEMENT.—See BILLS AND NOTES.

## EQUITY.

evidence establishing title good as against the world is essential to warrant a decree awarding initial registration of title in the applicant.....	69, 26
if applicant for initial registration fails to show title good as against the world, the application must be dismissed and not retained to remove alleged clouds.....	69, 26
master in chancery has no right to demand fees in advance before hearing defendant's testimony.....	230
master in chancery must hear evidence of both sides and award each side the right of cross-examination.....	230
when equity is the proper forum for enforcing rights under a party-wall agreement.....	238
owner of easement in stream is entitled to mandatory injunction to compel removal of obstruction.....	345
a mandatory injunction to compel restoration of water to natural channel lies, whether such channel is a natural water-course or an artificial stream.....	345
an owner of land set apart and used for cemetery with his consent may be enjoined from interfering with or desecrating the graves.....	411
bill should not be dismissed for want of equity, on general demurrer, if it shows any ground for equitable relief....	423
a decree <i>pro confesso</i> follows the sustaining of exceptions to the answer if no further answer is made.....	512
when superintendent of insurance may file a cross-bill to enjoin complainant company from continuing business..	512
when maintaining of hospital may be enjoined without a verdict declaring it a nuisance.....	553
fact that relief granted is not so extensive as that prayed does not defeat the decree, if such relief is within the prayer of the bill and not inconsistent therewith.....	553
a promise to marry, accompanied by false representation that promisor is unmarried, is ground for setting aside a conveyance made on faith of such promise.....	583

## ESTOPPEL.

PAGE.

when party cannot complain of instructions.....	172
when doctrine of estoppel by delay does not apply.....	238

## EVIDENCE.

re-marriage of plaintiff in an action for alleged negligent killing of her first husband cannot be considered by the jury in mitigation of damages .....	9
what may be shown on question of negligence of defendant's assistant yard-master.....	10
evidence establishing a title good as against the world is essential to warrant a decree awarding initial registration of title in the applicant.....	69, 26
what evidence is not sufficient to establish a title entitled to initial registration.....	26
proper foundation must be laid in a proceeding to register title for introduction of abstract of title .....	69
what does not show a claim of title under the Statute of Limitations .....	89
effect where tenant of grantor is in possession .....	89
recording of deed is not conclusive evidence of delivery...	104
what does not show absolute delivery of deed.....	104
presumption of delivery of deed from parent to adult child is not so strong as in case of a minor child.....	104
stipulation of facts used in a former trial which was not finally determined is not admissible in a second suit tried on another stipulation .....	151
a failure to deny, under oath, the execution of a contract, makes the contract admissible without proof of execution but does not preclude explanatory evidence .....	172
all writings evidencing same agreement and executed together are admissible in evidence.....	172
what evidence admissible in justification of discharge of plaintiff from employment.....	172
when conversation and letter are admissible in evidence as part of the contract of employment .....	172
a residence once established is presumed to continue until the contrary is shown.....	180
declarations are entitled to but little weight upon question of change of residence if inconsistent with party's acts.	180
intention to change residence is not sufficient.....	180
when party is a resident of Illinois within the meaning of the Inheritance Tax act .....	180
to warrant cancellation of tax deed in partition complainant must prove it invalid, as on a bill to remove cloud...	192
what sufficient to sustain decree setting aside a deed for fraud and misrepresentation.....	222

## EVIDENCE.—Continued.

PAGE.

when motion to direct verdict for defendant in a road obstruction case is properly denied.....	280
what evidence admissible as tending to show line of travel of alleged highway by prescription .....	280
evidence as to location of traveled route is properly limited, in road obstruction case, to point where the alleged highway was obstructed.....	280
owner's testimony as to his intention will not prevail over his inconsistent acts, relied upon by the public as indicating intention to dedicate road.....	281
resulting trust may be established by parol proof, but such proof must be clear and convincing.....	310
the common law rule as to a married woman's property is presumed to prevail in foreign State .....	340
when copy of notice of re-docketing cause cannot be received in evidence to overcome recitals of order of court re-docketing the cause.....	377
what facts show sufficient notice to mining company of the bad condition of mine .....	395
objection to hypothetical question should be specific.....	395
correct practice where council believes opponent's hypothetical question has omitted material facts.....	395
scope of cross-examination is largely a matter of discretion with the trial court.....	400
witness may be cross-examined as to his direct testimony in all of its bearings .....	400
city must affirmatively prove compliance with ordinance to warrant judgment for special tax .....	405
contract of corporation is admissible though abbreviation "Mfg." is used in its name and though the contract is not under seal.....	443
assessment roll is <i>prima facie</i> evidence of the benefits.....	544
benefits to lots owned by street railway company from improvement of streets are not limited to the particular use of the property.....	544
when master is liable for injury to servant who was acting in obedience to command .....	576
objection of variance between allegations and the proof cannot be first raised on appeal.....	576
what evidence does not necessarily establish the relation of fellow-servants.....	593
what is not proper cross-examination of plaintiff in an action of assumpsit on an account stated .....	636
when copies of letters are properly admitted.....	636
exceptions must be taken to improper rulings on evidence in order to preserve them for review .....	636

**EXECUTORS AND ADMINISTRATORS.**

PAGE.

- section 77 of Administration act, concerning specific allowance, applies though deceased householder was a widow.. 136
- age and financial condition of a female child do not affect her right to specific award under section 77 of Administration act..... 136
- word "family," used in section 74 of Administration act, means the persons comprising the family of the deceased at his death, whether children or servants..... 136
- fact that daughter contributed toward household expenses does not defeat her right to a specific award on ground she was a boarder ..... 136
- appointment of administrator constitutes part of the practice of courts of justice, within the meaning of the constitutional inhibition against special laws..... 385
- that part of section 18 of Administration act requiring appointment of public administrator in certain counties, if deceased was a non-resident, is void..... 385
- that part of section 18 of Administration act authorizing widow or next of kin to nominate administrator to the court is valid..... 385
- non-resident widow or next of kin may nominate administrator, under section 18 of the Administration act..... 385

**EXEMPTION FROM TAXATION.—See TAXES.****FALSE REPRESENTATIONS.—See FRAUDS.****FEES AND SALARIES.**

- master in chancery has no power to compel payment of fees in advance before hearing defendant's testimony..... 230

**FELLOW-SERVANTS.**

- whether a particular act by a yard-master was performed as vice-principal or as a fellow-servant of the party injured by such act is for the jury..... 9
- question whether miner and mule driver were fellow-servants is a question of fact if the evidence is conflicting. 226
- when question of fellow-servants is for the jury..... 593
- what evidence does not necessarily establish the relation of fellow-servants..... 593

**FIRE INSURANCE.—See INSURANCE.****FIXTURES.**

- proposed vendee cannot remove fixtures attached under a contract of purchase..... 443
- when vendee cannot claim machinery in a building on the land as personal property..... 443

## FORFEITURE.

PAGE.

- failure of corporation to make annual report under act of 1901 makes a *prima facie* case of non-user, but does not work absolute forfeiture of charter..... 352

## FORMER CASES.

- Comrs. of Highways v. Drainage Comrs.* 127 Ill. 581, and *County of McLean v. Bloomington*, 106 id. 209, distinguished, as to when *mandamus* lies to compel levy of assessment..... 17
- McChesney v. People*, 200 Ill. 146, followed, as to effect of anti-alien labor clause in specifications for public improvement. 75
- C. & N. W. Ry. Co. v. Jenkins*, 103 Ill. 588, distinguished, as to when railroad company is entitled to car service fee.. 199
- Powell v. Rich*, 41 Ill. 466, explained and criticised, as to when crops pass to grantee by deed containing no reservation to the grantor..... 287
- McChesney v. Chicago*, 205 Ill. 528, followed, as to new hearing not being necessary to eliminate illegal item of cost in special assessment case ..... 334
- Smith v. Chicago*, 169 Ill. 257, explained, as to constitutional provision for title of statute not applying to ordinance.. 544

## FRATERNAL INSURANCE.—See BENEFIT SOCIETIES.

## FRAUD.

- what evidence sufficient to sustain a decree setting aside deed for fraud and misrepresentation..... 222
- a promise to marry, accompanied by false representation that promisor is unmarried, is ground for setting aside conveyance made on faith of the promise..... 583

## FREEHOLD.

- when appeal in trespass is properly taken directly to Supreme Court, as involving a freehold..... 88
- freehold is not involved in petition by administrator to pay debts unless title is put in issue..... 410
- whether a freehold is involved on a bill to remove a cloud depends upon the nature of the cloud..... 562
- freehold is not involved on bill to cancel as a cloud a conditional contract to convey the land..... 562

## GENERAL ASSEMBLY.

- the right of employer and employee to contract for labor is both a liberty and a property right, which is free from legislative interference..... 624
- legislature has no power to provide that the owner of property shall not sell it to another and agree with the latter to accept work in payment..... 624

## GRANTOR AND GRANTEE.—See DEEDS.

## GUARANTY.

## PAGE.

liability of guarantor of a note is not released by payee's negligence in demanding payment.....	116
endorsement on back of a non-negotiable instrument does not create the liability of an endorser or guarantor within the law merchant.....	126
law of the place where a note was delivered and negotiated controls the liability of the parties.....	126

## GUARDIAN AND WARD.

trust arises by implication where guardian buys land in his own name with ward's money.....	215
purchaser of land from a guardian with notice that it was purchased with ward's money becomes a trustee for ward.	215
extent to which approval of a master's sale to guardian is <i>res judicata</i> as to title.....	215

## HIGHWAYS.—See ROADS AND BRIDGES.

building a fence within limits of highway is an obstruction, within meaning of section 71 of Road act.....	280
notice to remove obstruction is not necessary to right to recover penalty for obstructing road but is necessary to recover penalty for permitting obstruction to remain...	280
when motion to direct verdict for defendant in road obstruction case is properly denied.....	280
what evidence admissible as tending to show line of travel of alleged highway by prescription.....	280
evidence as to location of traveled route is properly limited, in a road obstruction case, to the place where the alleged highway was obstructed.....	280
law implies intention to dedicate from acts of owner, and upon acceptance by the public the dedication is complete.	280
owner's testimony as to intention will not prevail against his acts inconsistent with such intention where the public relied upon such acts.....	281
public may rely upon acts of land owner indicating intention to dedicate land for highway.....	281
user for any definite period is not required where the intention to dedicate is clearly implied and the dedication was accepted by the public.....	281

## HOMESTEAD.

widow cannot have two homestead estates at same time...	328
an equivocal intention to return to homestead is not sufficient to prevent an abandonment.....	328
abandonment of homestead by the widow is binding upon the minor children.....	328

## HOSPITALS.

PAGE.

- hospital must not be so conducted as to be a nuisance to adjoining property owners in nowise responsible for its location and operation..... 553
- when maintaining of hospital may be enjoined without a verdict declaring it a nuisance..... 553

## HUSBAND AND WIFE.

- when recital in a divorce decree that defendant had been guilty of adultery must prevail on writ of error..... 308
- when wife may have title to real estate in lieu of alimony. 308
- resulting trust may be established by clear parol proof.... 340
- common law rule as to married woman's property is presumed to prevail in a foreign State..... 340
- Illinois statute concerning married woman's property does not divest rights of husband acquired in a foreign State where the common law prevails..... 340

## HYPOTHETICAL QUESTIONS.—See EVIDENCE.

## ILLUSORY APPOINTMENT.—See WILLS.

## INFANTS.

- a trust arises by implication where guardian buys land in his own name with ward's money..... 215
- purchaser of land from a guardian with notice that it was purchased with ward's money becomes a trustee for ward. 215
- extent to which approval of master's sale to a guardian is *res judicata* on question of his title..... 215
- abandonment of homestead by the widow is binding upon the minor children..... 323

## INHERITANCE TAX.

- the "residence" intended by Inheritance Tax act is synonymous with "domicile" or "abode"..... 180
- residence once established is presumed to continue..... 180
- declarations have but little weight on question of change of residence if inconsistent with the party's acts..... 180
- intention to change residence is not sufficient..... 180
- when party is a resident of Illinois within the meaning of the Inheritance Tax act..... 180
- intention to postpone enjoyment of lands until grantor's death need not be expressed in deed, to make the Inheritance Tax act applicable..... 181
- when lands are subject to inheritance tax..... 181

## INJUNCTION.

- a mandatory injunction to compel restoration of water to natural channel lies, whether such channel is a natural water-course or an artificial ditch..... 345

INJUNCTION.—*Continued.*

PAGE.

owner of easement in stream is entitled to mandatory injunction to compel removal of obstruction.....	345
owner of land set apart and used for cemetery may be enjoined from desecrating graves.....	411
any person having friends or relatives buried in cemetery may file bill to enjoin desecration.....	411
when superintendent of insurance may file a cross-bill to enjoin complainant company from continuing business..	512
when maintaining of hospital in immediate proximity to complainant's dwelling may be enjoined without a verdict declaring it to be a nuisance.....	553
fact that relief granted is not so extensive as the relief prayed does not defeat the decree, if such relief is within the prayer of the bill and not inconsistent therewith....	553

## INSTRUCTIONS.

when party cannot complain of instructions.....	172
if instructions for both parties proceed on a wrong theory neither can complain of such error .....	226
limiting number of instructions on each side will not reverse if no prejudicial effect is shown.....	452
court may limit application of instruction to the count of the declaration it is designed to cover.....	452
giving an instruction after court has erased its interlineations is not reversible error.....	452
when alleged error in giving and refusing instructions can not be considered.....	486

## INSURANCE.

when plaintiff in action on fire policy has a title in fee simple for purpose of insurance .....	166
when insurance company is subject to legislative control though organized under special charter.....	316
if an insurance company ceases to transact business for a period of one year its charter becomes extinct as though it expired by limitation .....	316
when superintendent of insurance may file a cross-bill to enjoin complainant company from continuing business..	512

## JUDGMENTS AND DECREES.

judgment of reversal on particular error confessed is not <i>res judicata</i> as to other assignments of error urged but not considered by the court of review.....	61
judgment of sale for a delinquent special assessment must identify the property against which the judgment stands.	61
correct practice where defect in form of judgment is the only error .....	61

JUDGMENTS AND DECREES.— <i>Continued.</i>	PAGE.
when decree in partition is equivalent to cancellation of a tax deed as a cloud.....	192
recital in a partition decree that defendant had failed to show any title under his tax deed does not cure failure to prove the deed invalid.....	192
it is sufficient if enough allegations are proved to sustain a decree although others are not proved.....	215
extent to which approval of master's sale to a guardian is <i>res judicata</i> as to his title.....	215
when amendment of judgment is not a final order which is subject to appeal or writ of error .....	337
when amendment of judgment does not change the rights of the parties .....	337
when a copy of notice of re-docketing a cause cannot be received in evidence to overcome recitals of the order re-docketing the cause.....	377
judgment of sale must conform to the statute.....	377
a decree <i>pro confesso</i> follows the sustaining of exceptions to the answer if no further answer is made.....	512
when judgment in trespass <i>quare clausum fregit</i> is a bar to action of ejectment.....	517

#### JURISDICTION.

the revenue is involved in <i>mandamus</i> by drainage commissioners to compel a town to levy and collect a drainage assessment confirmed against it.....	17
objections to jurisdiction of county court to confirm drainage assessment will not be considered in a collateral proceeding unless they appear from the record .....	17
in pleading a judgment of the county court confirming a drainage assessment, facts showing jurisdiction of the subject matter and of the parties need not be averred ..	17
when appeal in trespass is properly taken directly to the Supreme Court as involving a freehold.....	88
when accumulation of interest does not confer appellate jurisdiction as increasing amount involved .....	250
freehold is not involved in petition by an administrator to pay debts unless title is put in issue .....	410
jurisdiction on election contest is limited to the question of who was elected.....	528
eligibility to office must be questioned by <i>quo warranto</i> , and not by a proceeding to contest party's election to office.	528
whether a freehold is involved on a bill to remove a cloud depends upon the nature of the cloud.....	562
freehold is not involved on bill to cancel as a cloud a conditional contract to convey the land.....	562

**JURISDICTION.**—*Continued.*

PAGE.

amount in controversy does not govern Supreme Court's jurisdiction of an appeal in proceeding to enjoin collection of judgment wrongfully obtained..... 621

**JURY.**—See **LAW AND FACT.****LABOR.**

the right of employer and employee to contract for labor is both a liberty and a property right, which is free from legislative interference..... 624  
 legislature has no power to provide that the owner of property shall not sell it to another and agree with the latter to accept work in payment..... 624  
 the act of 1891, prohibiting mine operator or manufacturer from setting off debts of employees against claims for wages, is unconstitutional ..... 624

**LACHES.**

when doctrine of estoppel by delay does not apply..... 238

**LAW AND FACT.**

whether a particular act by a yard-master was performed as vice-principal or as a fellow-servant of party injured by such act is for the jury..... 9  
 when question of negligence is properly left to the jury... 9  
 whether the evidence shows giving of notice by highway commissioners of meeting to consider petition for a new road is a question of fact for Appellate Court..... 34  
 whether a miner and a mule driver were fellow-servants is a question of fact, if the evidence bearing on the question is conflicting ..... 226  
 whether servant should have refused to obey order on account of obvious risk is ordinarily a question of fact.... 452  
 when question of fellow-servants is for the jury ..... 593  
 what does not necessarily establish the relation of fellow-servants as a matter of law..... 593  
 whether defendant was a resident of the county where suit was brought is a question of fact..... 630  
 questions of law cannot be considered by Supreme Court unless properly preserved for review..... 630

**LEGISLATURE.**—See **GENERAL ASSEMBLY.****LIMITATIONS.**

possession such as is contemplated by the Limitation act must be adverse, actual, visible, exclusive, continuous and under claim of ownership..... 88  
 what does not tend to show claim of title..... 89

LIMITATIONS.—*Continued.*

	PAGE.
effect where tenant is in possession .....	89
grantor's possession of a strip of land not included in deed cannot be tacked to grantee's possession unless such pos- session was actually delivered.....	89
when renting of land is not a recognition of title which in- terrupts the running of the statute.....	253
possession must be exclusive to operate as notice of rights under an unrecorded deed.....	258

## LODGES.—See BENEFIT SOCIETIES.

## MANDAMUS.

drainage commissioners may bring <i>mandamus</i> to compel a town to levy tax to pay assessment confirmed against it under the Levee act, without a judgment at law .....	17
when costs in <i>mandamus</i> are properly adjudged against town.	17
facts alleged in petition and not denied by the answer are admitted .....	97
commissioners of drainage district organized under Farm Drainage act of 1879 may be compelled to levy assess- ments and make repairs.....	97
<i>mandamus</i> should not issue in a doubtful case.....	316
county clerk can extend taxes only as they appear in the books, and he has no power to determine whether the taxes are legally assessed.....	469
<i>mandamus</i> will not lie to compel county clerk to extend tax on assessment which has been removed from the books by the board of review .....	469

## MARRIAGE.

a promise to marry, accompanied by false representation that promisor is unmarried, is ground for setting aside a conveyance made on faith of such promise.....	583
---	-----

## MASTER AND SERVANT.—See RAILROADS.

what fact may be shown in justification of discharge of the plaintiff from defendant's employ .....	172
when conversation and letter are admissible in evidence as part of contract of employment.....	172
employment of married man as traveling salesman may be conditioned on his not associating with certain women to whom he owes no legal obligation.....	172
contributory negligence of miner is no defense to willful violation of Mining act by employer .....	395
foreman should take reasonable precautions for servant's safety when ordering him to do special work with which he is not familiar.....	452

MASTER AND SERVANT.— <i>Continued.</i>	PAGE.
whether servant should have refused to obey order on account of obvious risk is ordinarily a question of fact....	452
when servant's knowledge of danger does not relieve master from liability for injury.....	452
when master is liable for injury to servant who was acting in obedience to command.....	576
what evidence does not necessarily establish relation of fellow-servants as a matter of law.....	503
right of an employer and employee to contract for labor is both a liberty and a property right, which is free from interference by the legislature.....	624
legislature has no power to provide that the owner of property shall not sell it to another, and agree with the latter to accept work in payment.....	624

#### MASTERS IN CHANCERY.

master in chancery cannot compel payment of fees in advance as a condition to hearing defendant's testimony..	230
it is the duty of the master in chancery to hear the testimony on both sides and to award each side the right of cross-examination.....	230

#### MINES.

whether miner and mule driver were fellow-servants is a question of fact, if the evidence tending to show the relation is conflicting .....	226
what sufficient notice to company of bad condition of mine.	395
contributory negligence of miner is no defense to employer's willful violation of Mining act.....	395
the right of employer and employee to contract for labor is both a liberty and a property right, which is free from legislative interference.....	624
legislature has no power to provide that the owner of property shall not sell it to another and agree with the latter to accept work in payment.....	624
act of 1891, prohibiting a mine operator or manufacturer from setting off debts of his employees against claims for wages, is unconstitutional.....	624

#### MINORS.—See INFANTS.

#### MISJOINDER.—See PARTIES.

#### MORTGAGES.

appointment of special commissioner to make sale and execute deed is not ground for collateral attack on the foreclosure decree.....	238
--	-----

## MOTIONS.

PAGE.

- motion to quash summons and service is properly denied  
when delayed until after the jury is selected and sworn. 540

## MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.

- drainage commissioners may bring *mandamus* to compel a town to levy tax to pay drainage assessment confirmed against it under Levee act, without a judgment at law.. 17  
when costs in *mandamus* are properly adjudged against town. 17  
statutory provisions prescribing method for levy of tax by municipal corporation must be strictly followed..... 79  
appropriation ordinance is not in force until ten days after its publication..... 79  
a tax levy ordinance passed before the appropriation ordinance takes effect is void..... 79  
appropriation for library tax is governed by the law concerning general appropriations..... 79  
when amendment to appropriation ordinance is void..... 79  
when city is not liable for balance due contractor on public improvement made by special assessment..... 151  
contract made by accepting terms of proposal is binding in its entirety, in absence of anything indicating an intention to limit acceptance..... 423  
city organized under the general law may issue twenty-year bonds for corporate purposes..... 492  
issuing bonds to pay judgment indebtedness of city is pledging credit for corporate purpose..... 492  
notice of election under act of 1879, relating to the issue of bonds by city, need be published but once..... 493  
judgment against city is evidence of indebtedness within meaning of act of 1879, authorizing new bonds to replace old bonds and other evidences of indebtedness..... 493  
amount due sinking fund is not a debt against a city to be considered in estimating its total indebtedness..... 493  
what items should be considered and what excluded in estimating city's indebtedness..... 493  
constitutional provision respecting title of statutes does not apply to city ordinances..... 544  
specifying the purpose of a town tax as for "town purposes" is not sufficient, where there is nothing to show what such purposes were..... 566  
electors at annual town meeting cannot exercise powers of board of town auditors..... 566  
certificate of board of town auditors is the basis of the tax levy to pay claims against the town..... 566  
a tax levy ordinance should specify in detail the purposes of the appropriations..... 566  
when tax levy ordinance is invalid..... 566

## NEGLIGENCE.

PAGE.

what does not relieve railroad company from liability for negligence of assistant yard-master .....	9
what evidence is proper upon question of negligence of defendant's assistant yard-master .....	10
liability of guarantor of note is not released by payee's negligence in demanding payment. ....	116
when miller is not liable for loss of grain by fire .....	296
millor who receives grain for safe keeping as an accommodation to the owner and without reward is held to use of ordinary care and diligence, only .....	296
contributory negligence of miner is no defense to employer's willful violation of Mining act .....	395
foreman should take reasonable precautions for servant's safety when ordering him to do special work .....	452
whether a servant should have refused to obey an order on account of obvious risk is ordinarily a question of fact..	452
when servant's knowledge of danger does not relieve master from liability for injury .....	452
street railway company is liable for inflicting wanton or willful injury on party stealing a ride .....	478
case must go to jury if evidence tending to prove alleged wanton injury is conflicting .....	478
objection that count charges different sets of facts, either of which authorizes recovery, must be by special demurrer.	478
when charges of negligence in count are divisible .....	478
when master is liable for injury to servant who was acting in obedience to command .....	576
what evidence does not necessarily establish the relation of fellow-servants as a matter of law .....	593

## NEGOTIABLE INSTRUMENTS.—See BILLS AND NOTES.

## NOTICE.

whether the evidence shows giving of notice by highway commissioners of meeting to consider petition for a new road is a question of fact for Appellate Court .....	34
grantor must have notice of acts of ownership by grantee in order to be bound thereby .....	104
possession must be exclusive to operate as notice of rights under an unrecorded deed .....	258
notice to remove an obstruction is not essential to right to recover penalty for obstructing road, but is necessary to recovery of <i>per diem</i> penalty for continuing obstruction.	280
what sufficient notice to company of bad condition of mine.	395
when servant's knowledge of danger does not relieve master from liability for injury .....	452
notice of election under the act of 1879, relating to issue of bonds by city, need be published but once .....	493

NUISANCE.	PAGE.
hospital must not be so conducted as to be a nuisance to adjoining property owners in nowise responsible for its location and operation.....	553
when maintaining of hospital may be enjoined without a verdict declaring it a nuisance .....	553

OFFICERS.—See COUNTY CLERKS.

ORDINANCES.—See SPECIAL ASSESSMENTS.

tax appropriation ordinance is not in force until ten days after its publication .....	79
tax levy ordinance passed before appropriation ordinance is in force is void.....	79
appropriation for library tax is governed by the law concerning general appropriations.....	79
when amendment to appropriation ordinance is void.....	79
constitutional provision respecting title of statutes does not apply to city ordinances .....	544
a tax levy ordinance must specify in detail the purposes of the appropriations .....	566
when tax levy ordinance is invalid.....	566

PARTIES.

special assessment proceeding against school property not part of the school section nor derived therefrom is not a suit against the State.....	37
if several parties seek relief against the same injury on the same grounds, a bill in which they join is not for that reason multifarious.....	345
any person having friends or relatives buried in cemetery may file bill to enjoin desecration.....	411
when writ of error will not be dismissed for mis-joinder ...	411

PARTITION.

to warrant a cancellation of a tax deed in a partition proceeding complainant must prove it invalid, the same as on a bill to remove a cloud.....	192
when decree is equivalent to cancellation of tax deed.....	192
allegations, in bill for partition, with respect to invalidity of tax deed must be supported by proof.....	192
recital in a partition decree that defendant has failed to show any title under his tax deed does not cure a failure to prove the deed invalid.....	192

PARTY WALLS.

a party wall means a solid wall, unless the agreement provides otherwise.....	238
when equity is the proper forum for enforcing rights under a party-wall agreement.....	238

PLEADING.	PAGE.
in pleading a judgment of county court confirming a drainage assessment, facts showing jurisdiction of the subject matter and of the parties need not be averred.....	17
facts alleged in a petition for <i>mandamus</i> and not denied by answer are admitted.....	97
answering over waives right to assign error upon the overruling of the demurrer.....	345
if several parties seek relief against the same injury upon the same grounds, a bill in which they join is not for that reason multifarious.....	345
objection that count charges different sets of facts, either of which authorizes recovery, must be by special demurrer.	478
when charges of negligence in count are divisible.....	478
what a sufficient averment of ownership by plaintiff in action of trespass <i>quare clausum fregit</i> .....	517
a decree <i>pro confesso</i> follows the sustaining of exceptions to answer if no further answer is made.....	512
when the superintendent of insurance may file cross-bill to enjoin complainant company from continuing business..	512
party is not entitled, as of right, to leave to amend pleading regardless of what the amendment is to be.....	528

POSSESSION.—See ADVERSE POSSESSION.

POWERS.

when power of appointment by will is discretionary as to the division of the property.....	430
what provision of will does not require division of property, under power of appointment, to be equal.....	430
doctrine of illusory appointment does not obtain in Illinois.	430

PRACTICE.—See APPEALS AND ERRORS.

abstract of record should be indexed.....	46
if irregularity in the form of a judgment of sale is the only error, the case will be reversed with directions to enter a proper judgment .....	61
cost of an additional abstract of record will not be taxed to appellant if it was unnecessary.....	136
section 61 of Practice act, allowing parties to agree to trial of matters of law and fact by the court, does not authorize Supreme Court to review facts.....	150
effect of section 61 of Practice act.....	150
to preserve questions of law for review where case is tried without a jury, propositions of law should be submitted.	150
master in chancery has no right to demand fees in advance before hearing defendant's testimony.....	230

PRACTICE.—*Continued.*

	PAGE.
master in chancery must hear testimony of both sides and award each side the right of cross-examination.....	230
appeal must be dismissed if perfected by only one of the parties to whom it was jointly allowed.....	235
criminal cases must be reviewed on writ of error, as there is no statutory provision in Illinois for an appeal therein.	247
amount involved on appeal in action <i>ex contractu</i> is determined from pleadings, if there was no trial of an issue of fact in the lower court.....	250
when accumulation of interest does not confer appellate jurisdiction as increasing amount involved.....	250
amendments to objections to application for judgment of sale should be permitted if made in apt time .....	312
objection to hypothetical question should be specific.....	395
correct practice where counsel believes opponent's hypothetical question omits material facts.....	395
when order dismissing bill may be reviewed.....	411
bill should not be dismissed for want of equity, on general demurrer, if it shows any ground for equitable relief....	411
a decree <i>pro confesso</i> follows the sustaining of exceptions to answer if no further answer is made.....	512
party is not entitled, as of right, to leave to amend a pleading regardless of what the amendment is.....	528
there is no presumption that a proposed amendment not presented will be a proper one.....	528
when leave to amend may be refused .....	528
motion to quash summons and service is properly denied when delayed until after the jury is selected and sworn..	540
when it will be presumed, on appeal in chancery, that the evidence sustained the decree although the evidence is not preserved in the record .....	604
abstract of record should be supplied with a complete index, alphabetically arranged.....	604
recitals of decree that the court had jurisdiction and that the allegations of the bill are true do not take the place of a certificate of evidence.....	621
in order to sustain a decree granting the prayer of the bill the complainant must preserve the evidence.....	621
questions of law cannot be considered by Supreme Court unless properly preserved for review.....	630
statutory conditions of appeal must be complied with.....	632
time fixed by trial court for filing an appeal bond does not extend the time fixed by statute for filing transcript of record in Appellate Court.....	632
section 72 of Practice act controls time for filing transcript.	632

## PRESCRIPTION.—See HIGHWAYS.

## PRESUMPTIONS.

PAGE.

it is conclusively presumed that the action of the improvement board in submitting an ordinance to the council was voluntary.....	56
what facts raise presumption that illegal provisions in the specifications and ordinance for an improvement entered into the competitive bidding.....	61
presumption of delivery of deed from parent to adult child is not so strong as in case of a minor child.....	104
fact that grantor remains in possession of land is against the presumption of absolute delivery.....	104
residence once established is presumed to continue until the contrary is shown.....	180
it is presumed that a will was executed in view of the existing statutes and that they were intended to apply to a contingency not provided for in the will.....	266
when action of circuit court in refusing to dismiss appeal from justice of peace will be presumed to be correct....	280
it is presumed the common law rule as to married woman's property prevails in a foreign State.....	340
benefit certificates are presumed to be worth their face value when assessing them for taxation.....	472
when it will be presumed, on appeal in chancery, that the evidence authorized the decree although the evidence is not preserved in the record.....	604
it is presumed the testator intended to dispose of his entire estate by the will and not to leave any part of it as intestate property.....	611

## PROPOSITIONS OF LAW.

to preserve questions of law for review where case is tried without a jury, propositions of law should be submitted.	150
refusal of propositions of law is proper where they are not applicable to the facts or where they present mixed questions of law and fact.....	443

## PUBLIC IMPROVEMENTS.—See SPECIAL ASSESSMENTS.

when city is not liable for balance due contractor on public improvement made by special assessment.....	151
--	-----

## QUO WARRANTO.

eligibility to office must be questioned by <i>quo warranto</i> , and not by a proceeding to contest the party's election.....	528
--	-----

## RAILROADS.—See STREET RAILWAYS.

what does not relieve company from liability for act of an assistant yard-master.....	9
under what facts the question of negligence of defendant's yard-master is properly left to the jury.....	9

RAILROADS.—*Continued.*

PAGE.

whether a particular act by a yard-master was performed as vice-principal or as a fellow-servant of the party injured by such act is for the jury.....	9
re-marriage of plaintiff in an action for alleged negligent killing of first husband cannot be considered by the jury in mitigation of damages.....	9
railroad company is entitled to reasonable car service fee after allowing consignee reasonable time to unload car.	199
lien for car service fee need not arise from specific contract	199
distance consignee must haul freight when unloading car is not an element bearing upon the reasonableness of the time allowed to unload.....	199

## REAL PROPERTY.—See WILLS; MORTGAGES.

evidence establishing title good as against the world is essential to warrant a decree awarding initial registration of title in the applicant.....	69, 26
if the applicant for initial registration fails to show title against the world he is not entitled to have the alleged clouds thereon removed in that proceeding.....	69, 26
recording of deed is not conclusive evidence of delivery...	104
what evidence does not show delivery of deed.....	104
presumption of delivery of deed from parent to adult child is not so strong as in case of a minor child.....	104
fact that grantor remains in possession of land is against the presumption of absolute delivery.....	104
grantor must have notice of acts of ownership by grantee in order to be bound thereby.....	104
when plaintiff in action on fire policy has a fee simple title for the purpose of insurance.....	166
<i>cestui que trust</i> acquires no property, in law, so long as the trust subsists, however he may be regarded in equity....	166
title of trustee is commensurate with his powers.....	166
when land is subject to inheritance tax.....	181
intention to postpone enjoyment of land until the grantor's death need not appear in writing in order to make the Inheritance Tax act applicable.....	181
to warrant cancellation of a tax deed in a partition proceeding complainant must prove it invalid, the same as in a bill to remove a cloud.....	192
allegations, in bill for partition, with respect to invalidity of tax deed must be supported by proof.....	192
when decree is equivalent to cancellation of tax deed....	192
what evidence sufficient to sustain decree setting aside a deed for fraud and misrepresentation.....	222
a party wall means a solid wall, unless the agreement provides otherwise.....	238

**REAL PROPERTY.—Continued.****PAGE.**

when renting of land is not a recognition of title which interrupts the running of the Statute of Limitations.....	253
possession must be exclusive to operate as notice of rights under an unrecorded deed.....	258
widow's latent equities under unrecorded deed are waived where she joins in a deed with the holder of the apparent record title.....	258
in absence of reservation in deed, crops not severed from the soil, though mature and ready to be gathered, pass to grantee upon delivery of deed.....	287
widow cannot have two homestead estates at same time ..	328
an equivocal intention to return to homestead is not sufficient to prevent an abandonment.....	328
abandonment of homestead by the widow is binding upon the minor children.....	328
resulting trust may be established by parol proof, but such proof must be clear and convincing.....	340
common law rule as to a married woman's property is presumed to prevail in a foreign State.....	340
Illinois statute concerning married woman's property does not divest rights of husband acquired in a foreign State where the common law prevails.....	340
proposed vendee cannot remove fixtures attached to land under a contract of purchase.....	443
when vendee cannot claim machinery in a building on the land as personal property.....	443
a promise to marry, accompanied by false representation that promisor is unmarried, is ground for setting aside a conveyance made on faith of such promise .....	583

**REGISTRATION OF TITLES.**

evidence establishing a title good as against the world is essential to warrant a decree awarding initial registration of title in the applicant.....	69, 26
if an applicant for initial registration fails to prove title against the world he is not entitled to have alleged clouds thereon removed in that proceeding .....	69, 26
on appeal from a decree awarding initial registration of title and canceling defendant's tax deed, defendant may urge that the proof of title was insufficient.....	26
what does not establish a title in fee sufficient to warrant a decree awarding initial registration and canceling the defendant's tax deed as a cloud .....	26
proper foundation must be laid, in registration proceeding for introduction of abstract of title.....	69

**RESIDENCE.—See DOMICILE.**

RES JUDICATA.	PAGE.
judgment of reversal on particular error confessed is not <i>res judicata</i> as to other assignments of error urged but not considered by the court of review.....	61
extent to which approval of master's sale to a guardian is <i>res judicata</i> on question of his title.....	215
when a judgment in trespass <i>quare clausum fregit</i> is a bar to action of ejectment.....	517
fact that party is entitled to a second trial in ejectment does not prevent judgment in trespass <i>quare clausum fregit</i> from being <i>res judicata</i> .....	517
RESULTING TRUSTS.—See TRUSTS.	
REVENUE.—See TAXES.	
the revenue is involved in <i>mandamus</i> by drainage commissioners to compel a town to levy and collect a drainage assessment confirmed against it.....	17
REVERSION.	
a reversion is subject to devise.....	611
RIGHTS AND REMEDIES.—See ACTIONS AND DEFENSES.	
ROADS AND BRIDGES.—See HIGHWAYS.	
when record of highway commissioners cannot be amended so as to sustain road and bridge tax.....	566
certificate of levy for road and bridge tax should show the total amount required and the specific amounts required for each purpose enumerated.....	566
SCHOOLS.	
school property not a part of section 16 of the township nor derived therefrom is subject to special assessment.....	37
special assessment proceeding against school property not a part of section 16 of the township nor derived therefrom is not a suit against the State.....	37
payment of special assessment against school property is a proper application of funds of school district.....	37
Chicago board of education has implied power to sue and be sued.....	37
fact that school property cannot be sold does not defeat a special assessment against it.....	37
SECONDARY EVIDENCE.—See EVIDENCE.	
SETTLEMENT OF ESTATES.—See EXECUTORS AND ADMINISTRATORS.	
SIDEWALKS.—See SPECIAL TAXATION.	

## SPECIAL ASSESSMENTS.

PAGE.

objections to jurisdiction of county court to confirm drainage assessment will not be considered in a collateral proceeding unless they appear from the record of that court.	17
objections to drainage assessment under Levee act which might have been urged at confirmation are waived in a proceeding to collect the assessment.....	17
the statute provides for a specific tax to pay a drainage assessment confirmed against a town under Levee act...	17
in pleading judgment of county court confirming a drainage assessment, facts showing jurisdiction of the subject matter and of the parties need not be averred.....	17
school property not a part of section 16 of the township nor derived therefrom is subject to special assessment.....	37
special assessment proceeding against school property not a part of section 16 nor derived therefrom is not a suit against the State.....	37
payment of special assessment against school property is a proper application of funds of the district.....	37
fact that school property cannot be sold does not defeat a special assessment against it.....	37
it is conclusively presumed that the action of the improvement board in submitting ordinance to the council was voluntary.....	56
improvement board's resolution for the improvement need not give a detailed description of the same, such as is essential in the ordinance.....	56
when description of asphalt in ordinance is not uncertain.	56
when provision of ordinance for "back filling" is valid....	56
judgment of reversal on particular error confessed is not <i>res judicata</i> as to other assignments of error urged but not considered by the court of review.....	61
absence of itemized estimate of cost from record of first resolution for improvement cannot be shown by extrinsic evidence on application for sale .....	61
effect of eight-hour day and anti-alien labor provisions of ordinance for public improvement.....	75, 61
what facts raise a presumption that illegal provisions entered into the competitive bidding.....	61
judgment of sale for delinquent assessment should identify the property against which the judgment stands .....	61
if irregularity in the form of a judgment of sale is the only error, the case will be reversed with directions to enter a proper judgment .....	61
when city is not liable for balance due contractor on public improvement made by special assessment.....	151
lack of jurisdiction to confirm assessment must appear from the face of the record to be ground for collateral attack.	334

SPECIAL ASSESSMENTS.—*Continued.*

PAGE.

new hearing is not required to eliminate illegal inclusion of the cost of levying the assessment .....	377, 334
absence of estimate of cost from record of first resolution for improvement is not an available objection to application for judgment of sale.....	377, 334
when special assessment ordinance is not void.....	377
when reduction of assessment by consent of petitioner and property owners.....	377
judgment of sale must conform to the statute.....	377
constitutional provision respecting title to statute does not apply to city ordinances.....	544
lots owned by street railway company but not a part of its right of way are not within the proviso to section 40 of the Local Improvement act.....	544
when lots owned by street railway company may be assessed together as one parcel of land .....	544
to authorize assessing lots as one parcel it is not essential that the buildings be under one roof.....	544
benefits to lots owned by street railway company from improvement of street are not limited to the particular use of the property.....	544
assessment roll is <i>prima facie</i> evidence of the benefits.....	544

## SPECIAL INTERROGATORIES.

special interrogatories propounded by the court of its own motion should first be submitted to counsel.....	486
when failure of court to submit a special interrogatory to counsel is prejudicial error.....	486

## SPECIAL LEGISLATION.—See CONSTITUTIONAL LAW.

## SPECIAL TAXATION.

city must affirmatively prove compliance with ordinance in order to obtain judgment for special tax.....	405
what is not such a bill of cost of sidewalk as is required by the Sidewalk act of 1875.....	405
provisions of Sidewalk act must be complied with to render a special tax thereunder valid .....	405

## SPECIFIC AWARD.—See EXECUTORS AND ADMINISTRATORS.

## STATUTE OF LIMITATIONS.—See LIMITATIONS.

## STATUTES.—See CONSTITUTIONAL LAW; CONSTRUCTION.

laws exempting property from taxes are construed strictly.	37
provisions of statute designed for protection of tax-payer are mandatory .....	50

STATUTES.—*Continued.*

PAGE.

intention to give statute retrospective operation must be clearly expressed in the act or it will be given prospective operation only ..... 97

## STIPULATIONS.

Supreme Court cannot review facts in suit at law though case was tried before the court without a jury, on a stipulation of the facts ..... 150

stipulation of facts used in a former trial which was not finally determined is not admissible in a second trial on another stipulation ..... 151

## STREAMS.

owner of easement in stream is entitled to mandatory injunction to compel removal of obstruction..... 345

mandatory injunction to compel restoration of water to natural channel will lie, whether the channel is a natural water-course or an artificial ditch..... 345

## STREET RAILWAYS.

a street railway company is liable for inflicting wanton or willful injury on party stealing a ride..... 478

case must go to jury if the evidence tending to prove the alleged wanton injury is conflicting..... 478

lots owned by a street railway company but not part of its right of way are not within the proviso to section 40 of the Local Improvement act..... 544

when lots owned by a street railway company may be assessed together as one parcel of land..... 544

to authorize assessing lots as one parcel of land it is not essential that the buildings be under one roof..... 544

benefits to lots owned by street railway company from improvement of a street are not limited to the particular use of the property..... 544

## STREETS AND ALLEYS.—See HIGHWAYS; ROADS AND BRIDGES.

## SUMMONS.

motion to quash summons and service is properly denied when delayed until after jury is selected and sworn..... 540

## TAX DEEDS.—See REGISTRATION OF TITLE.

to warrant cancellation of tax deed in partition complainant must prove it invalid, as on a bill to remove a cloud.. 192

recital in a partition decree that defendant failed to show any title under his tax deed does not cure failure to prove the deed invalid..... 192

TAXES.—See SPECIAL ASSESSMENTS.	PAGE.
statute provides for levy of a specific tax to pay drainage assessment confirmed against town under the Levee act.	17
laws exempting property from taxes are strictly construed.	37
property exempt by law from taxation is not necessarily exempt from special assessment.....	37
school property not part of section 16 of the township nor derived therefrom is subject to special assessment.....	37
power of drainage commissioners to impose tax is limited and must be strictly construed.....	50
when certificate of drainage commissioners is insufficient to support a repair tax and cannot be amended so as to render the tax valid.....	50
disregard of provisions of a statute designed for the protection of tax-payers invalidates the tax.....	50
statutory provisions prescribing method for levy of tax by municipal corporations must be strictly followed.....	79
appropriation ordinance is not in force until ten days after its publication.....	79
a tax levy ordinance passed before the tax appropriation ordinance is in force is void.....	79
appropriation for library tax is governed by the law concerning general appropriations.....	79
when amendment to appropriation ordinance is void.....	79
the "residence" intended by Inheritance Tax act is synonymous with "domicile" or "abode".....	180
when party is a resident of Illinois within meaning of the Inheritance Tax act.....	180
intention to postpone enjoyment of lands until grantor's death need not be expressed in deed to make the Inheritance Tax act applicable.....	181
when lands are subject to inheritance tax.....	181
amendments to objections to application for judgment of sale should be permitted if made in apt time.....	312
what amendment to objection is proper.....	312
county clerk must extend taxes as they appear in the books, and it is not his duty to determine whether the taxes are legally assessed.....	469
<i>mandamus</i> will not lie to compel county clerk to extend tax on assessment which has been removed from the books by the board of review.....	469
benefit certificates are taxable as credits though proofs of death have not been made by April 1 and the certificates are not payable till after receipt of such proofs.....	472
benefit certificates are presumed to be worth their face value when assessing them for taxation.....	472
electors at annual town meeting cannot exercise powers of board of town auditors.....	566

TAXES.—*Continued.*

PAGE.

specifying the purpose of town tax as for "town purposes" is not sufficient, where there is nothing to show what the purposes were.....	566
certificate of board of town auditors is the basis of the levy of a tax to pay claims against the town.....	566
when record of highway commissioners cannot be amended so as to sustain road and bridge tax.....	566
certificate of levy for road and bridge tax should show total amount required and the specific amount for each purpose specified.....	566
a tax levy ordinance must specify in detail the purposes of the appropriations.....	566
when tax levy ordinance is invalid.....	566

TORRENS LAND ACT.—See REGISTRATION OF TITLES.

TOWNS.—See MUNICIPAL CORPORATIONS.

## TRESPASS.

when action of trespass involves a freehold.....	88
street railway company is liable for inflicting a wanton or willful injury on party stealing a ride .....	478
when judgment in trespass <i>quare clausum fregit</i> is a bar to action of ejectment.....	517
what a sufficient averment of ownership by plaintiff in trespass <i>quare clausum fregit</i> .....	517

## TRIAL.

when question of negligence is properly left to the jury...	9
to preserve questions of law for review where case is tried without a jury, propositions of law should be submitted..	150
stipulation of facts used in a former trial which was not finally determined is not admissible in a second trial on another stipulation.....	151
when motion to direct a verdict for defendant in road obstruction case is properly denied.....	280
objection to hypothetical question should be specific.....	395
correct practice where counsel believes opponent's hypothetical question has omitted material facts .....	395
scope of cross-examination is largely matter of discretion on part of the trial court.....	400
witness may be cross-examined as to his direct testimony in all of its bearings.....	400
counsel entitled to reasonable latitude in argument.....	400
when absence of judge from court room will not reverse...	400
when refusal to grant continuance is proper.....	452
case must go to the jury if the evidence tending to prove alleged wanton injury is conflicting.....	478

TRIAL.—*Continued.*

PAGE.

objection that count charges different sets of facts, either of which authorizes a recovery, must be made by special demurrer.....	478
special interrogatories propounded by the court of its own motion should first be submitted to counsel.....	486
exception must be taken to improper rulings on evidence in order to preserve them for review.....	636
what is not proper cross-examination as to account stated.	636
when copies of letters are properly admitted.....	636

## TRUSTS.

<i>cestui que trust</i> acquires no property, in law, so long as the trust subsists, however he may be regarded in equity....	166
title of trustee is commensurate with powers given .....	166
a trust arises by implication where guardian buys land in his own name with ward's money.....	215
purchaser of land from a guardian with notice that it was purchased with ward's money becomes a trustee for ward.	215
resulting trust may be established by parol proof, but the proof must be clear and convincing.....	340
when trust created by will is active.....	534
when a trust created by will is not void for uncertainty of its objects.....	534

## USER.—See HIGHWAYS.

## VARIANCE.

objection of a variance between allegations and the proof cannot be first raised on appeal.....	576
--	-----

## VILLAGES.—See MUNICIPAL CORPORATIONS.

## WAGES.

the act of 1891, prohibiting mine operator or manufacturer from setting off debts of employees against claims for wages, is unconstitutional.....	624
---	-----

## WAIVER.

when objections to drainage assessment are waived.....	17
going to trial before the same judge without objection after obtaining a change of venue waives the objection of his disqualification.....	46
widow's latent equities under unrecorded deed are waived where she joins in a deed with the holder of the apparent record title.....	258
answering over waives right to assign error upon the over- ruling of the demurrer.....	345

## WATERS.—See STREAMS.

## WILLS.

PAGE.

it is presumed, in absence of any showing to the contrary, that existing statutes were intended to prevail in case of a contingency not provided for by the will.....	266
effect of section 11 of Statute of Descent where devise is to children as a class.....	266
when child of deceased devisee will take under section 11 of Statute of Descent though no provision for such case is made in the will.....	266
when power of appointment by will is discretionary as to division of the property.....	430
what provision of will does not require division of property, under power of appointment, to be equal.....	430
doctrine of illusory appointment does not obtain in Illinois.	430
when trust created by will is active.....	534
when trust is not void for uncertainty of its objects.....	534
if two clauses of will are repugnant the later prevails....	534
a reversion is subject to devise.....	611
it is presumed the testator intended to dispose of all of his property by the will and not to leave any part of it intestate estate.....	611
when devise of residue applies to all of the testator's remaining estate.....	611
testator's intention is not to be determined by single clause of the will but from the entire will.....	611
when "remainder" need not be given its technical meaning.	611
when children take a life estate.....	611

## WORDS AND PHRASES.

written promise to pay a sum of money with interest "and taxes" is not a promissory note, where the amount of such taxes is uncertain.....	126
when word "taxes," in written promise to pay money, can not be rejected as surplusage.....	126
word "family," used in section 74 of Administration act, includes servants of a deceased householder at his death..	136
the "residence" intended by Inheritance Tax act is synonymous with "domicile" or "abode".....	180
term "active business," used in act of 1901, requiring corporations to make annual reports, means the doing of the things the corporation was organized for.....	352
use of abbreviation "Mfg." in name of corporation signing contract does not render the contract inadmissible.....	443
when "remainder" need not be given its technical meaning.	611



# TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR  
EXPLAINED IN THIS VOLUME.

A	PAGE.
Adams, County of, v. City of Quincy, 130 Ill. 566 .....	43
Aden v. Road District No. 3, 197 Ill. 220.....	38
Agrey v. Fearnside, 4 M. & W. 168.....	134, 132
Akers v. Clark, 184 Ill. 136.....	620, 618
Alden Coal Co. v. Challis, 200 Ill. 222.....	417, 416
Alexander v. Alexander, 2 Ves. Sr. 639.....	440
Allen v. Henn, 197 Ill. 486 .....	605
Alton, City of, v. Middleton's Heirs, 158 Ill. 442 .....	160
American Exch. Nat. Bank v. Chicago Nat. Bank, 131 Ill. 547...	156
Am. Warehouse Ass. v. I. C. R. R. Co. 7 Inter-State Com. Rep. 556.	212
Anchor Line v. Knowles, 66 Ill. 150.....	207
Anderson v. Smith, 159 Ill. 93.....	341
Arenz v. Weir, 89 Ill. 25.....	360
Armstrong v. Armstrong, 35 Ill. 109.....	310
Arnold v. Alden, 173 Ill. 229 .....	275

B	
Bailey v. Smith, 168 Ill. 84.....	157, 156, 36
Baker v. Administrator of Backus, 32 Ill. 79 .....	358
Barber v. Hawley, 116 Ill. 91.....	156
Barker v. Brown, 138 Mass. 340 .....	212
Barnett v. Wolf, 70 Ill. 76.....	381, 380
Barr's Appeal, 1 Monaghan, 768.....	149
Bartley v. Spaulding, 21 D. C. 47 .....	246
Bauerle v. Long, 165 Ill. 340.....	515, 348
Beatty v. Kurtz, 2 Pet. 585.....	415
Bickerdike v. City of Chicago, 203 Ill. 636.....	336, 65
Biggins' Estate v. People, 193 Ill. 601.....	408
Bilderback v. Burlingame, 27 Ill. 338 .....	133, 132
Bloch v. Isham, 28 Ind. 37 .....	244
Bloomington Cemetery Ass. v. People, 139 Ill. 16.....	43
Board of Education v. Bakewell, 122 Ill. 339.....	369, 368, 359
Board of Supervisors of Livingston County v. Weider, 64 Ill. 427.	504

	PAGE.
Booth v. Wiley, 102 Ill. 84 .....	220
Bowman v. Bowman, 64 Ill. 75 .....	369
Boyce v. Kalbaugh, 47 Md. 334 .....	416
Boyd v. Town of Farm Ridge, 103 Ill. 408 .....	282
Bradford v. City of Pontiac, 165 Ill. 612 .....	163
Bradley, <i>In re</i> , 7 Wall. 364 .....	377
Bradley's Estate, 166 Pa. St. 300 .....	278
Brady v. Cole, 164 Ill. 115 .....	591, 588
Branch v. Rankin, 108 Ill. 444 .....	393
Brooke v. Strothers, 110 Mich. 562 .....	132
Brown v. Brown, 167 Ill. 631 .....	112
Brown v. Curtis, 2 Coms. 225 .....	120
Bruffett v. Great Western R. R. Co. 25 Ill. 310.....	370, 367, 358, 323
Buck v. Conlogue, 49 Ill. 391 .....	331
Burdick v. People, 149 Ill. 600 .....	369, 368
Burgett v. Osborne, 172 Ill. 227 .....	351
Burr v. City of Carbondale, 76 Ill. 455 .....	504
Bush v. Shipman, 4 Scam. 186 .....	367
Butcher v. Butcher, 9 Ves. 382 .....	437
Butler v. Walker, 80 Ill. 345 .....	360

## C

Cabeen v. Mulligan, 37 Ill. 230 .....	332, 331
Campbell v. Campbell, 63 Ill. 462 .....	368
Canal Trustees v. City of Chicago, 12 Ill. 403 .....	43
Carmody v. Crane, 110 Mich. 508 .....	132
Carson v. Merle, 3 Scam. 168 .....	237
Casey v. People, 165 Ill. 49 .....	335, 66, 21
Catholic Knights v. Board of Review, 198 Ill. 441 .....	476
Chadwick v. People, 206 Ill. 122 .....	608
Chalcraft v. Louisville, Evans. and St. L. R. R. Co. 113 Ill. 86..	622
Cheney v. Selman, 71 Ga. 384 .....	278
Chicago and Alton R. R. Co. v. Clausen, 173 Ill. 100 .....	159
Chicago and Alton R. R. Co. v. Gore, 202 Ill. 188 .....	491
Chicago and Alton R. R. Co. v. House, 172 Ill. 601 .....	400
Chicago and Alton R. R. Co. v. May, 108 Ill. 288 .....	601, 599
Chicago and Alton R. R. Co. v. Suffern, 129 Ill. 274 .....	99
Chicago Anderson Brick Co. v. Sobkowiak, 148 Ill. 573 .....	581, 460
Chicago, Burlington and Quincy R. R. Co. v. Jones, 149 Ill. 361.	361
Chicago, City of, v. Chicago, R. I. and P. Ry. Co. 152 Ill. 561..	285
Chicago, City of, v. McDonald, 176 Ill. 404 .....	509
Chicago, City of, v. Nodeck, 202 Ill. 257 .....	66
Chicago, City of, v. People, 48 Ill. 416 .....	164, 163
Chicago, City of, v. People, 56 Ill. 327 .....	165, 164, 163
Chicago, City of, v. Wright, 69 Ill. 318 .....	286
Chicago City Ry. Co. v. Sandusky, 198 Ill. 400 .....	461
Chicago and Eastern Illinois R. R. Co. v. Driscoll, 176 Ill. 330..	10
Chicago and Eastern Illinois R. R. Co. v. People, 200 Ill. 237...	54

	PAGE.
Chicago Edison Co. v. Moren, 185 Ill. 571 .....	460
Chicago and Grand Trunk Ry. Co. v. Spurney, 197 Ill. 471.....	485
Chicago Life Ins. Co. v. Auditor, 101 Ill. 82.....	324
Chicago and Northwestern R. R. Co. v. Jenkins, 103 Ill. 588....	212
Chicago and Northwestern Ry. Co. v. People, 184 Ill. 240 .....	315
Chicago, Peoria and St. L. R. R. Co. v. Woolridge, 174 Ill. 330 ...	16
Chicago Union Traction Co. v. City of Chicago, 204 Ill. 363. 610,	552
Chicago Union Traction Co. v. City of Chicago, 202 Ill. 576 ....	552
Chicago West Division Ry. Co. v. Mills, 105 Ill. 63.....	220
Cincinnati v. White, 6 Pet. 440.....	417
Cissna v. Walters, 100 Ill. 623.....	344
Clay v. Smallwood, 100 Ky. 212.....	439
Cline v. Jones, 111 Ill. 563.....	113
Coles v. Madison County, Breese, 154.....	367
Commercial Nat. Bank v. Cauniff, 151 Ill. 329.....	631, 156
Commissioners of Highways v. Drainage Comrs. 127 Ill. 581....	21
Commissioners of Highways v. Newell, 80 Ill. 587.....	54
Connelly v. United States Sewer Pipe Co. 184 U. S. 540 .....	629
Consolidated Coal Co. v. Gruber, 188 Ill. 584.....	601
Cooke v. Cooke, 194 Ill. 225 .....	421
Cookson v. Richardson, 69 Ill. 137.....	219
Corbin v. Hill, 21 Iowa, 70 .....	361
Corcoran v. Nailor, 6 Mackey, (D. C.) 580.....	246, 245
Cotton, Estate of, 54 Cal. 215.....	393
Cowles v. Brown, 4 Call. (Va.) 477 .....	441
Craig v. People, 47 Ill. 487.....	515
Crandall v. Sorg, 198 Ill. 48.....	176
Crouch v. Hall, 15 Ill. 263.....	344
Crozer v. People, 206 Ill. 464.....	55, 36
Culver v. City of Chicago, 171 Ill. 399.....	383
Cummings v. City of Chicago, 144 Ill. 563.....	389
Cushman v. Bonfield, 139 Ill. 219.....	220
Cutting v. Stokes, 76 Hun, 376.....	244

## D

Dalrymple v. Leach, 192 Ill. 51 .....	620
Danville, City of, v. Danville Water Co. 178 Ill. 299.....	360
Darlington v. Missouri Pacific R. R. Co. 72 S. W. Rep. 122.....	212
Dartmouth College v. Woodward, 4 Wheat. 518.....	367
Dauenhauer v. Devine, 51 Tex. 480.....	246, 244
Davidson v. New Orleans, 96 U. S. 97.....	369
Davidson v. Reed, 111 Ill. 167.....	417, 416, 415
Day, <i>In re</i> , 181 Ill. 73.....	100
Dean v. Comstock, 32 Ill. 173.....	522
DeBaun v. Moore, 32 N. Y. App. Div. 397 .....	246
Degman v. Degman, 98 Ky. 717 .....	440, 439
Despain v. Wagner, 163 Ill. 598.....	341
Devine v. Commissioners of Cook County, 84 Ill. 590 .....	389

	PAGE.
Dickerson v. Derrickson, 39 Ill. 574.....	125, 124
Dickey v. People, 160 Ill. 633.....	335, 65, 21
Dierks v. Commissioners of Highways, 142 Ill. 197.....	560
Dinet v. Eigenmann, 80 Ill. 274.....	310
Diversey v. Smith, 103 Ill. 378.....	360
Donaldson v. Grant, 15 Utah, 231.....	132
Dooley v. Crist, 25 Ill. 551.....	449
Dorsey v. Wolff, 142 Ill. 589.....	132
Dowden v. Wilson, 108 Ill. 257.....	588
DuPuy v. Wurtz, 53 N. Y. 556.....	189

## E

Earl v. DeHart, 12 N. J. Eq. 280.....	348
Ellis v. County Comrs. 2 Gray, 370.....	377
Ellison v. Hammond, 189 Ill. 470.....	237
Elson v. Comstock, 150 Ill. 303.....	522
Erringdale v. Riggs, 148 Ill. 403.....	344
Ervine's Appeal, 16 Pa. St. 256.....	369
Everly v. Driskill, 24 Tex. Civ. App. 413.....	246

## F

Fairbury Union Agricultural Board v. Holly, 169 Ill. 9.....	286
Farquhar v. Fidelity Trust and Deposit Co. 13 Phila. 473....	134, 132
Farwell & Co. v. Shove, 105 Ill. 61.....	156
Fast v. McPherson, 98 Ill. 496.....	220
Field v. Peeples, 180 Ill. 376.....	25
Fields v. Coker, 161 Ill. 186.....	410
Fish v. McGann, 205 Ill. 179.....	323
Fishburn v. City of Chicago, 171 Ill. 338.....	58
Fiske v. People, 188 Ill. 206.....	67
Flagg v. Roberts, 67 Ill. 485.....	49
Fletcher v. City of Oshkosh, 18 Wis. 228.....	165
Flinn v. Owen, 58 Ill. 111.....	197
Fonda v. Jackson, 203 Ill. 113.....	635
Fort Dearborn Lodge v. Klein, 115 Ill. 177.....	522
Foster v. City of Alton, 173 Ill. 587.....	165, 163, 162
Francis v. Roades, 146 Ill. 635.....	342
Fronty v. Fronty, 1 Bailey's Eq. 527.....	441
Frorer v. People, 141 Ill. 171.....	629, 627

## G

Gage v. Bissell, 119 Ill. 302.....	196
Gage v. Caraher, 125 Ill. 447.....	361
Gage v. City of Chicago, 195 Ill. 490.....	381, 378
Gage v. Curtis, 122 Ill. 520.....	198
Gage v. McLaughlin, 101 Ill. 155.....	196, 30
Gage v. Mechanics' Nat. Bank of Chicago, 79 Ill. 62.....	124
Gage v. People, 207 Ill. 61.....	336, 78, 76, 74, 73

	PAGE.
Gage v. Reid, 104 Ill. 509.....	198, 196, 30
Gage v. Stokes, 125 Ill. 40.....	196
Gardt v. Brown, 113 Ill. 475.....	176
Garnett v. Myers, 91 N. W. Rep. 400.....	132
Gay v. Rainey, 89 Ill. 221.....	129
Giddings v. Blacker, 93 Mich. 1.....	375
Gleason & Bailey Manf. Co. v. Hoffman, 168 Ill. 25.....	348
Glos v. Hallowell, 190 Ill. 65.....	71
Glos v. Kingman & Co. 207 Ill. 26.....	73
Glover v. People, 188 Ill. 576.....	380
Goldie v. Werner, 151 Ill. 551.....	15
Gooch v. Green, 102 Ill. 507.....	420
Gordon v. Reynolds, 114 Ill. 118.....	348
Graeff v. DeTurk, 44 Pa. St. 527.....	441
Graver Tank Works v. O'Donnell, 191 Ill. 236.....	16
Graves v. Smith, 87 Ala. 450.....	244
Green v. Grant, 143 Ill. 61.....	171
Green Co. v. Blodgett, 159 Ill. 169.....	449
Greencastle, City of, v. Allen, 43 Ind. 347.....	165
Greenwood v. Murphy, 131 Ill. 604.....	530
Gregg v. Illinois Central R. R. Co. 147 Ill. 550.....	208, 206
Gridley v. Capen, 72 Ill. 11.....	123
Guitar v. Gordon, 17 Mo. 408.....	278

## H

Habergham v. Vincent, 2 Ves. Jr. 203.....	114
Haenni v. Bleisch, 146 Ill. 262.....	591
Hagaman v. Dittmar, 24 Kan. 42.....	416
Hammond v. People, 169 Ill. 545.....	20
Hance v. Miller, 21 Ill. 636.....	123
Harber v. Evans, 101 Mo. 661.....	246, 244
Harding v. People, 160 Ill. 459.....	629
Hardy v. Rapp, 112 Ill. 359.....	156
Harlem, Village of, v. Suburban R. R. Co. 202 Ill. 301.....	623
Hart v. Seymour, 147 Ill. 598.....	538
Hartley v. Chicago and Alton R. R. Co. 197 Ill. 440.....	602
Hatchett v. Hatchett, 103 Ala. 556.....	438
Hawley v. Simons, 102 Ill. 115.....	523
Hayes v. Boylan, 141 Ill. 400.....	113, 112
Hayes v. Hayes, 74 Ill. 312.....	188
Hayes v. Houke, 45 Ill. 466.....	416
Heacock v. Hosmer, 109 Ill. 245.....	49
Heaton v. Hulbert, 3 Scam. 489.....	120
Herbert v. Herbert, Breese, 354.....	112
Hickey v. Chicago and Western Ind. R. R. Co. 6 Ill. App. 172..	349
Higgins v. City of Chicago, 18 Ill. 276.....	43
Hileman v. Beale, 115 Ill. 355.....	237
Hill v. Todd, 29 Ill. 101.....	133, 132

	PAGE.
Hinsdale, Village of, v. Shannon, 182 Ill. 312.....	547
Hintze v. City of Elgin, 186 Ill. 251.....	59
Hoke v. Henderson, 4 Dev. 1.....	369
Holland v. People, 189 Ill. 348.....	408
Hollenbeck v. Detrick, 162 Ill. 388.....	103
Hooker v. Gooding, 86 Ill. 60.....	122
Hoover v. People, 171 Ill. 182.....	409, 408
Howe v. People, 86 Ill. 288.....	549
Howell v. Todd, Fed. Cas. No. 6783.....	133, 132
Hoyt v. Jaffray, 29 Ill. 104.....	133, 132
Hoyt v. Sprague, 61 Barb. 491.....	215
Hughes v. Carne, 135 Ill. 519.....	196
Hunt v. Sain, 181 Ill. 372.....	347
Hunter v. Stoneburner, 92 Ill. 75.....	221, 220
Huron, City of, v. Second Ward Sav. Bank, 30 C. C. A. 38....	505, 503
Hutchinson v. Howe, 100 Ill. 11.....	565
Hyde v. Heath, 75 Ill. 381.....	198, 196

## I

Illinois Central R. R. Co. v. Alexander, 20 Ill. 24.....	212, 207
Illinois Central R. R. Co. v. Beede, 174 Ill. 13.....	403
Illinois Central R. R. Co. v. City of Bloomington, 76 Ill. 447....	360
Illinois Central R. R. Co. v. Friend, 64 Ill. 303.....	207
Illinois Steel Co. v. McFadden, 196 Ill. 344.....	460
Illinois Steel Co. v. Schymanowski, 162 Ill. 447.....	601, 581, 460
Illinois and St. Louis R. R. and Coal Co. v. Cobb, 68 Ill. 53.....	92
Indiana, Decatur and Western Ry. Co. v. People, 201 Ill. 351..	568
Indiana, Illinois and Iowa R. R. Co. v. Swannell, 157 Ill. 616 ...	220
Ingram v. Meade, 3 Wall. Jr. 32.....	441
Inter-State Commerce Com. v. Railway Co. 74 Fed. Rep. 803....	212
Irwin v. Northwestern Nat. Life Ins. Co. 200 Ill. 577.....	532

## J

Jackson v. Sackett, 146 Ill. 646.....	331
Jacksonville Ry. Co. v. City of Jacksonville, 114 Ill. 562.....	510
Jarrot v. Vaughn, 2 Gilm. 132.....	528
Jenkins v. Pierce, 98 Ill. 646.....	506
Johnson v. VonKettler, 66 Ill. 63.....	63, 49
Joliet, City of, v. Alexander, 194 Ill. 457.....	510
Jones v. Buffum, 50 Ill. 277.....	157, 156
Jones v. Kennicott, 83 Ill. 484.....	530
Justen v. Schaaf, 175 Ill. 45.....	284

## K

Keith v. Miller, 174 Ill. 64.....	344
Kellogg v. Hale, 108 Ill. 164.....	538
Kelly v. City of Minneapolis, 63 Minn. 125.....	510
Kemp v. Kemp, 5 Ves. 848.....	440
Kesner v. Miesch, 204 Ill. 320.....	565

	PAGE.
Keyser v. Sutherland, 59 Mich. 455. ....	526
Kilgour v. Drainage Comrs. 111 Ill. 342.....	18
King v. King, 168 Ill. 273 .....	171
Kingsbury v. Burnside, 58 Ill. 310. ....	112
Kirkland v. Cox, 94 Ill. 400.....	538, 171
Knopf v. People, 185 Ill. 20.....	391
Koster v. Miller, 149 Ill. 195.....	342
Kreitz v. Behrensmeyer, 125 Ill. 141.....	186

## L

Lake Erie and Western R. R. Co. v. Morrissey, 177 Ill. 376.....	466
Lancaster v. Lancaster, 187 Ill. 540.....	271
Lange v. Heyer, 195 Ill. 420.....	49
LaSalle, City of, v. Kostka, 190 Ill. 130.....	460
Lawrence v. Lawrence, 181 Ill. 248.....	171
Leitch v. People, 183 Ill. 569.....	65
Leshner v. Wirth, 14 Ill. 39.....	141
Lines v. Darden, 5 Fla. 51.....	441
Little v. Barry, 94 N. C. 433.....	393
Lockrow v. Cline, 46 Pac. Rep. 720.....	132
Lowe v. Bliss, 24 Ill. 168. ....	132, 131
Lynn v. Lynn, 160 Ill. 307.....	411

## M

Mackin v. Haven, 187 Ill. 480. ....	273
Maher v. City of Chicago, 38 Ill. 266.....	165, 164, 163
Marbury v. Madison, 1 Cranch, 149.....	375
Mathews v. People, 202 Ill. 389.....	629
Matthews v. Hoff, 113 Ill. 90.....	25
Mayer v. Springer, 95 Ill. App. 173, and 192 Ill. 270.....	297
Maynard v. Maynard, 10 Mass. 458.....	112
Mayor of Roodhouse v. Briggs, 194 Ill. 435.....	99
McCartney v. Osburn, 118 Ill. 403.....	271
McChesney v. City of Chicago, 205 Ill. 528.....	381, 379, 336
McChesney v. People, 174 Ill. 46.....	68
McChesney v. People, 200 Ill. 146 .....	78, 67
McEwan v. City of Spokane, 16 Wash. 212.....	165
McFarland v. Claypool, 128 Ill. 397.....	530
McHaney v. Trustees of Schools, 68 Ill. 140.....	100
McIntyre v. Sholty, 139 Ill. 171 .....	421
McLean, County of, v. City of Bloomington, 106 Ill. 209.....	43, 22
McMahon v. Sankey, 133 Ill. 636.....	490
McNab v. Young, 81 Ill. 11 .....	264
Means v. Harrison, 114 Ill. 248.....	100
Merchants' Dispatch Transportation Co. v. Hallock, 64 Ill. 284. 207	
Merchants' Dispatch Transportation Co. v. Moore, 88 Ill. 136..212, 207	
Metcalf v. Fouts, 27 Ill. 110.....	157, 156
Miller v. Georgia R. R. Co. 88 Ga. 563.....	212, 208

	PAGE.
Miller v. Mansfield, 112 Mass. 260 .....	209, 208
Milne's Appeal, 81 Pa. St. 54 .....	244
Missionary Society v. Pell, 14 R. I. 456 .....	278
Missouri, Kansas and Texas Ry. Co. v. Simonson, 64 Kan. 802..	361
Mobile and Ohio R. R. Co. v. Massey, 152 Ill. 144 .....	15
Moffett v. South Park Comrs. 138 Ill. 620 .....	286
Moore v. Dimond, 5 R. I. 121 .....	278
Moore v. People, 106 Ill. 376 .....	549
Moore v. Titman, 43 Ill. 169 .....	332
Moore v. Weaver, 16 Gray, 305 .....	278
Morris & Whitehead v. Taylor, (Ore.) 49 Pac. Rep. 660.....	505
Moses v. Allen, 81 Me. 269 .....	276
Mott v. Danville Seminary, 129 Ill. 403 .....	196
Mount Carbon Coal and R. R. Co. v. Blanchard, 54 Ill. 240.....	349
Mueller v. Henning, 102 Ill. 646 .....	524
Murphy v. Murphy, 189 Ill. 360 .....	591

## N

National Life Ins. Co. v. Mead, 13 S. Dak. 37.....	504
National Linseed Oil Co. v. Heath & Milligan Co. 191 Ill. 75....	532
Newland v. Marsh, 19 Ill. 376 .....	362
Norfolk and Western R. R. Co. v. Adams, 90 Va. 393.....	212
Normille v. Gill, 157 Mass. 427 .....	244
North Chicago Street R. R. Co. v. Anderson, 176 Ill. 635.....	403
North Chicago Street R. R. Co. v. Cotton, 140 Ill. 486 .....	403
Northwestern Life Ins. Co. v. City of Aberdeen, 20 Wash. 102..	165
Norton Bros. v. Nadebok, 190 Ill. 595.....	601, 16
Noyes v. Kern, 94 Ill. 521 .....	49

## O

Offutt v. World's Columbian Exposition, 175 Ill. 472 .....	460
O'Flaherty v. Mann, 196 Ill. 304 .....	256
Ogden v. Stock, 34 Ill. 522 .....	449
Oswald v. Wolf, 129 Ill. 200 .....	560
Ottawa Gas Light and Coke Co. v. Downey, 127 Ill. 201.....	145
Oxford Bank v. Haynes, 8 Pick. 423.....	120

## P

Park Ridge, Village of, v. Robinson, 198 Ill. 571.....	163
Parkhurst v. Vail, 73 Ill. 343 .....	122
People v. Board of Supervisors, 185 Ill. 288 .....	391
People v. Brinkerhoff, 68 N. Y. 259 .....	377
People v. Chicago and Alton R. R. Co. 193 Ill. 364 .....	569, 568
People v. Chicago and Alton R. R. Co. 194 Ill. 51.....	569, 568, 315
People v. City of Chicago, 124 Ill. 636 .....	42
People v. City of Pontiac, 185 Ill. 437.....	162
People v. City of Syracuse, 144 N. Y. 63....	165
People v. Clark County, 50 Ill. 213 .....	22

	PAGE.
People v. Crabb, 156 Ill. 155.....	99
People v. Dupuyt, 71 Ill. 651 .....	504
People v. Getzendaner, 137 Ill. 234.....	25, 23, 22
People v. Hanahan, 75 Mich. 611 . . . . .	547
People v. Hutchinson, 172 Ill. 486.....	375
People v. Johnson, 100 Ill. 537 ....	327
People v. Knopf, 183 Ill. 410 .....	391
People v. Lane, 36 Ill. App. 649.....	25
People v. Mallary, 195 Ill. 582 .....	375
People v. Martin, 178 Ill. 611 .....	391
People v. Matteson, 17 Ill. 167.....	377
People v. Peoria, Decatur and Ev. R. R. Co. 116 Ill. 410....	575, 85
People v. Rose, 167 Ill. 147.. . . .	376
People v. Sellars, 179 Ill. 170.....	328, 327
People v. Simon, 176 Ill. 165 .....	362
People v. Talmadge, 194 Ill. 67.....	381, 65
People v. Thompson, 155 Ill. 451.....	375
People v. Town of Mount Morris, 145 Ill. 427 .....	327
People v. Trustees of Schools, 118 Ill. 52.. . . .	42
People v. VanCleave, 187 Ill. 125, and 183 Ill. 330.....	376
People v. Wagoner, 86 Mich. 594 .....	547
Peoria, Decatur and Evansville Ry. Co. v. People, 141 Ill. 483..	54
Peoria and Pekin Un. Ry. Co. v. C., R. I. & P. Ry. Co. 109 Ill. 135..	205
Peoria and Pekin Un. Ry. Co. v. Rolling Stock Co. 136 Ill. 643....	206
Perisho v. People, 185 Ill. 334.....	380, 65
Perry v. Bozarth, 198 Ill. 328. . . . .	248
Pfeiffer v. People, 170 Ill. 347.....	551
Phillips v. Boardman, 4 Allen, 147.....	246
Phillips v. South Park Comrs. 119 Ill. 626....	220
Philpott v. Pennsylvania R. R. Co. 175 Pa. St. 570.....	16
Piper v. Connelly, 108 Ill. 646.....	92
Pipher v. People, 183 Ill. 436. . . . .	65
Pittsburg Bridge Co. v. Walker, 170 Ill. 550.....	601, 465
Pontiac, City of, v. Talbot Paving Co. 94 Fed. Rep. 65.....	163
Port Huron, City of, v. McCall, 46 Mich. 565 .....	507
Porter v. Chicago and Rock Island R. R. Co. 20 Ill. 408.....	207
Portland Savings Bank v. City of Evansville, 25 Fed. Rep. 389..	505
Powell v. Rich, 41 Ill. 466.....	290
Preachers' Aid Society v. England, 106 Ill. 125.....	171
Purcell Co. v. Sage, 189 Ill. 79.....	532
Purdy v. Hall, 134 Ill. 298.....	197

## R

Reese v. Wallace, 113 Ill. 589.....	219
Regents v. Williams, 9 Gill & Johns. 365.....	372, 371, 368, 367
Reish v. Commonwealth, 106 Pa. St. 521.....	191
Reock v. Mayor of Newark, 33 N. J. L. 129.....	165
Rhinehart v. Schuyler, 2 Gilm. 473.....	369

	PAGE.
Rhoads v. City of Metropolis, 144 Ill. 580.....	522
Rice v. City of Milwaukee, 100 Wis. 516.....	510
Rice v. Rice, 108 Ill. 199.....	219
Richards v. Mich. Southern and North. Ind. R. R. Co. 20 Ill. 405.....	207
Richards v. People, 100 Ill. 423.....	622
Richie v. Cox, 188 Ill. 276.....	411
Riebling v. People, 145 Ill. 120.....	20
Riverside Co. v. Howell, 113 Ill. 256.....	84
Robbins v. Robbins, 101 Ill. 416.....	310
Robertson v. Wheeler, 162 Ill. 566.....	262
Robinson, <i>Ex parte</i> , 86 U. S. 505.....	375
Rohn v. Harris, 130 Ill. 525.....	369
Ross v. Ross, 78 Ill. 402.....	310
Rothschild v. Michigan Central R. R. Co. 69 Ill. 164.....	207
Russell v. Koehler, 66 Ill. 459.....	215

## S

Salter v. Sample, 71 Ill. 430.....	449
Sampson v. People, 188 Ill. 592.....	49
Sands v. Kagey, 150 Ill. 109.....	157, 156
Schlee v. Guckenheimer, 179 Ill. 593.....	344
Schnadt v. Davis, 185 Ill. 476.....	234
School Trustees v. Kirwin, 25 Ill. 73.....	220
Scofield v. Olcott, 120 Ill. 362.....	270
Seibert, Appeal of, 110 Pa. St. 329.....	191
Shepard v. Brewer, 65 Ill. 383.....	333
Silverman v. Kristufek, 162 Ill. 222.....	538
Slack v. Harris, 200 Ill. 96.....	602
Smith v. City of Chicago, 169 Ill. 257.....	547
Smith v. Laatsch, 114 Ill. 271.....	272
Smith v. Moore, 26 Ill. 392.....	449
Smith v. Munroe, 1 Ired. L. (23 N. C.) 345.....	393
Smyth v. Neff, 123 Ill. 310.....	63
Spencer v. Allerton, 60 Conn. 410.....	130
Springer v. Darlington, 198 Ill. 121.....	241
Springfield, City of, v. Edwards, 84 Ill. 626.....	510
Springfield and Ill. S. E. Ry. Co. v. County Clerk, 74 Ill. 27.....	328, 327
Stacey v. Randall, 17 Ill. 467.....	176
Steenberg v. People, 164 Ill. 478.....	381
Stirlen v. Jewett, 165 Ill. 410.....	348
St. John v. Sweeney, 59 How. Pr. 175.....	246
St. Louis Nat. Stock Yards v. People, 127 Ill. 22.....	571
Stockbridge, Petitioner, 145 Mass. 517.....	278
Stone v. Moore, 26 Ill. 165.....	515
Story v. Livingstone, 13 Pet. 359.....	515
Stowell v. Raymond, 83 Ill. 120.....	122
Strawn v. Strawn, 53 Ill. 263.....	147, 145
Strong v. Smith, 84 Mich. 567.....	277, 276, 275

	PAGE.
Sullivan v. Eddy, 154 Ill. 199 .....	112
Sullivan v. Graffort, 35 Iowa, 531 .....	246, 244
Swafford v. Rosenbloom, 189 Ill. 392 .....	635
Swain v. First Nat. Bank, 201 Ill. 416.....	156
Swigert, <i>In re</i> , 119 Ill. 83.....	42

## T

Tarkio v. Cook, 120 Mo. 1.....	547
Taussig v. Reid, 145 Ill. 488.....	124
Taylor v. Porter, 4 Hill, 140 .....	369
Taylor v. Thompson, 42 Ill. 9 .....	504
Tedrick v. Wells, 152 Ill. 214.....	237
Terre Haute and Ind. R. R. Co. v. P. & P. U. Ry. Co. 167 Ill. 296. 197	
Terrett v. Taylor, 9 Cranch, 51.....	369
Thompson v. Alexander, 11 Ill. 54 .....	100
Thompson v. City of Chicago, 197 Ill. 599.....	334
Thompson v. City of Highland Park, 187 Ill. 265.....	546
Thompson v. People, 192 Ill. 79.....	490
Thorndike v. City of Boston, 1 Metc. 242 .....	189, 188
Thrasher v. Ballard, 35 W. Va. 524 .....	438
Throop v. Sherwood, 4 Gilm. 92.....	639
Tibballs v. Libby, 97 Ill. 552 .....	156
Tinkler v. Cox, 68 Ill. 119.....	344
Tosetti Brewing Co. v. Koehler, 200 Ill. 369.....	623
Town v. Howieson, 175 Ill. 85 .....	237
Traute v. White, 46 N. J. Eq. 437.....	244
Tripp v. Hasceig, 20 Mich. 254.....	290

## U

Union Ins. Co. v. Crosby, 172 Ill. 335 .....	158, 156
Union Mutual Life Ins. Co. v. Slee, 123 Ill. 57 .....	220
Union Ry. and Transit Co. v. Kallaher, 144 Ill. 325 .....	463
United States v. Klein, 13 Wall. 128 .....	361

## V

Vance v. Rankin, 194 Ill. 625.....	365
VanSyckel v. Tryon, 6 Phila. 401.....	246
VanSyckel's Estate, 9 Pa. Dist. 367 .....	441
Vennum v. People, 188 Ill. 158.....	408
Vollmer's Appeal, 61 Pa. St. 118.....	246, 244
Voltz v. Harris, 40 Ill. 155 .....	121

## W

Wahl v. Laubersheimer, 174 Ill. 338 .....	284
Wahle v. Reinbach, 76 Ill. 322.....	560
Walker v. City of Chicago, 202 Ill. 531.....	57
Walker v. People, 170 Ill. 410.....	384, 381
Wallace v. Cox, 71 Ill. 548.....	25
Ward v. Farwell, 97 Ill. 593.....	324

	PAGE.
Wedgbury v. Cassell, 164 Ill. 622.....	476
Weems v. Mayfield, 75 Miss. 287.....	244
Weidekin v. Snelson, 17 Ill. App. 461..	350
Weidenger v. Spruance, 101 Ill. 278.....	360
Weld v. Rees, 48 Ill. 428 .....	506
Wescott v. Wicks, 72 Ill. 524 .....	420
West Chicago Street R. R. Co. v. Annis, 165 Ill. 475.....	403
West Chicago Street R. R. Co. v. Dedloff, 92 Ill. App. 547.....	463
Western Stone Co. v. Muscial, 196 Ill. 382.....	460
Westervelt v. Gregg, 12 N. Y. 209 .....	368
White v. Flynn, 23 Ind. 46.....	361
Whiteside v. Divers, 4 Scam. 336 .....	528
Wilson v. Wilson, 102 Ill. 297.....	310
Wolford v. Deemer, 89 Ill. App. 524 .....	147
Woolley v. Paxson, 46 Ohio St. 307.....	276
Worden v. Salter, 90 Ill. 160.....	124, 123
Work v. Hall, 79 Ill. 196 .....	515
Wormley v. Wormley, 98 Ill. 544.....	112
Wright v. Bennett, 3 Scam. 258.....	528
Wunderle v. Wunderle, 144 Ill. 40. ....	145

## Y

Yates v. People, 207 Ill. 316.....	515, 513
Yeates v. Gill, 9 B. Mon. 203...	278
Young v. People, 171 Ill. 299.....	380, 335, 66, 21

## Z

Zirngibl v. Calumet Dock Co. 157 Ill. 430..	95
---	----

Ex. J. 4  
7764

11-7-13  
27



